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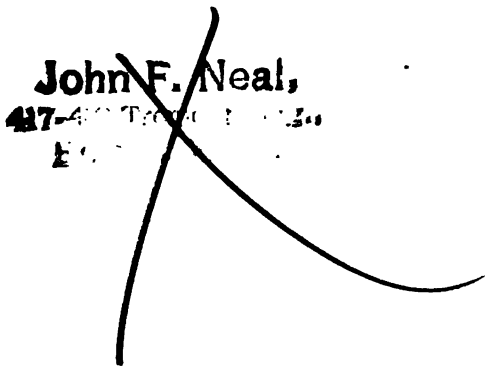

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MASSACHUSETTS REPORTS

221

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

APRIL 1915—SEPTEMBER 1915

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY
1916

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. CHARLES AMBROSE DE COURCY.
HON. JOHN CRAWFORD CROSBY.
HON. EDWARD PETER PIERCE.
HON. JAMES BERNARD CARROLL.

ATTORNEY GENERAL

HON. HENRY CONVERSE ATTWILL.

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In pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

INTERNATIONAL TEXTBOOK COMPANY *vs.* CHARLES D. MARTIN.

Suffolk. November 20, 1914. — April 3, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Of guaranty, Construction, In writing, Performance and breach, Validity. *Damages*, In contract. *Agency*, Effect of false representations of agent. *Guaranty*. *Practice, Civil*, Ordering verdict.

A contract in writing between the proprietor of a correspondence school and a subscriber to a scholarship therein contained provisions that the subscriber should pay for his scholarship a certain sum in sixteen instalments of a certain amount each, "the first instalment to be paid at the time of the signing of the subscription" and the others "within each and every period of four weeks hereafter until said price is paid in full," and also that "the price" to be paid for the scholarship included all charges for instruction in a certain subject until the subscriber was "qualified to receive a diploma or certificate of proficiency, provided" he completed "said course within five years from the date" of the contract, that the subscription should "not be subject to cancellation" and that the proprietor of the school should "not be required to refund any part of the money paid for said scholarship." Within five months from the date of the contract, the subscriber stopped studying and refused to make any further payments, and the proprietor of the school, after the date when the last instalment was to have been paid, brought an action to recover the amount of all unpaid instalments. *Held*, that the agreement of the subscriber to pay the stipulated price for a scholarship was an independent promise and that therefore the proprietor of the school was entitled to recover the amount of all unpaid instalments and was not limited to

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a recovery merely of the damages sustained by reason of the subscriber's breach of the contract.

Where one in writing guarantees the payment of the price for a scholarship agreed by another person to be paid "in accordance with the terms of the within subscription," the contract of subscription is incorporated into the contract of guaranty and, if the contract of subscription contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," the guarantor, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract.

Where, at the trial of an action upon a guaranty in writing, the defendant admits the execution of the agreement of guaranty and all the defences offered by the defendant are as a matter of law untenable and there is no question as to the amount due under the contract, it is proper to order a verdict for the plaintiff.

CONTRACT upon an agreement in writing whereby the defendant guaranteed the payment by his son to the plaintiff of sums of money agreed by the son to be paid according to the provisions of an agreement as to a scholarship. Writ in the Municipal Court of the City of Boston dated January 5, 1912.

On appeal to the Superior Court, the case was tried before *Hitchcock*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the plaintiff in the sum of $57.67; and the defendant alleged exceptions.

J. F. Gadsby, for the defendant.

C. E. Lawrence, for the plaintiff.

LORING, J. By the written agreement between the plaintiff and the defendant's son, the son subscribed "for a Scholarship in the International Correspondence Schools, covering a Course of Correspondence Instruction in Telephone Engineering," and he promised to "Pay for said Scholarship the sum of" $78.40, in instalments of $5 each, the first instalment to be paid at the time of signing the subscription and the remaining instalments "within each and every period of four weeks hereafter until said price is paid in full." It was further agreed that in case of default in the payment of any one of said instalments when due and payable the whole of the amount remaining unpaid should thereupon at the option of the plaintiff become due and payable. The contract contained these further provisions: "It is agreed as

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follows: First: That the price hereinafter agreed to be paid for said Scholarship shall include: (a) All charge for instruction in all subjects of the course for which said Scholarship calls until I am qualified to receive a Diploma or Certificate of Proficiency, provided I complete said Course within five years from the date hereof. . . . Fourth: That this Subscription, when accepted by you, shall not be subject to cancellation, and that you will not be required to refund any part of the money paid for said Scholarship." In addition to the foregoing the following words were printed at the bottom of the contract: "We do not refund money paid for Scholarship."

The defendant guaranteed "the payment to you [the plaintiff] of the price agreed to be paid for the within-mentioned Scholarship in accordance with the terms of the within subscription." Both contracts were dated August 22, 1910.

The son pursued his studies under the plaintiff's instruction for some four months and paid four instalments in addition to that paid when the contract was signed. He then (on or about January 1, 1911) stopped studying and refused to make any further payments. This action on the guaranty was brought on January 5, 1912, to recover the unpaid instalments amounting to $53.40.

The defendant admitted that he signed the contract and that he read it before he signed it. That included the plaintiff's contract with the son, which by the terms of the contract of guaranty was incorporated into the guaranty contract. Two defences were set up: First, that on or about January 1, 1911, when he was not in default in the payment of the instalments due from him, the son elected not to go on with the instruction called for by the contract; and, second, that certain misrepresentations were made by the agent of the plaintiff when the contract was signed by the son.

The first defence is in effect based on the assumption that the contract sued on was a contract to pay $5 a month for instruction to be given to the son by the plaintiff until the sum of $78.40 had been paid, or, if that contention be not sound, that under the circumstances we have stated the plaintiff is not entitled to recover the contract price but is entitled to recover damages only for breach of the contract by the son. The latter

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defence is stated in the fourth and fifth rulings asked for by the defendant, and set forth in the footnote.*

It is plain that the contract is not a contract for instruction by the month, to be paid for and furnished until $78.40 should have been paid. By the terms of the contract between the son and the plaintiff, the son subscribed "for a Scholarship in the International Correspondence Schools, covering a Course of Correspondence Instruction in Telephone Engineering," to be given until he was qualified to receive a diploma or certificate of proficiency, provided he completed the course within five years from the date of the agreement. That is to say, the son had five years in which to complete the course and the plaintiff was bound to carry on the instruction agreed to be given for that period, or until the son should be qualified to receive a diploma within that period. The payments to be made by the son were to be made in sixteen instalments (fifteen of which were for the sum of $5 each and the sixteenth for the sum of $3.40), and these instalments were to be paid every four weeks, beginning with the date of the signing of the contract. The case comes within the first rule of Serjeant Williams in his note to *Pordage* v. *Cole*, 1 Saund. 319, 320. That rule is in these words: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." This again was founded upon the judgment of Chief Justice Holt in *Thorp* v. *Thorp*,

* "4. Although the performance of the contract on the part of the plaintiff was prevented by the refusal to perform on the part of Walter G. Martin, subscriber, yet the plaintiff is not entitled to the entire contract price less the amount paid, but only to the amount of damages caused by the breach of contract on the part of the subscriber, Walter G. Martin.

"5. By the terms of the written agreement, the plaintiff had to make expenditures for stamps, typewriting, corrections on papers, etc. The facts as to these expenditures are especially within the knowledge of the plaintiff, but as the plaintiff has not offered the necessary evidence to show what these expenses will amount to, it will be impossible for you to fix the damages and therefore you will find for the defendant."

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12 Mod. 455, 461. In other words the promise contained in this contract which the plaintiff now seeks to enforce was an independent, not a dependent, promise.

In case of independent promises the promisor has to perform his promise and, if he does not get what he pays for, his remedy is by a cross action. In the case at bar the plaintiff has been ready and willing at all times to go on with the son's instruction, but the son has refused to study. The plaintiff has not been guilty of any breach of its agreement. Under these circumstances the defendant's contention comes to this: The maker of an independent promise who renounces his right to the thing paid for by him can show that fact in reduction of the sum the promisee is entitled to recover under the independent promise. The case of *International Text-Book Co.* v. *Martin*, 82 Neb. 403, seems in effect to be a decision that there is such a right to reduce the amount to be recovered in such a case. It was there held that the burden was on the defendant to prove the benefit ensuing to the plaintiff by the defendant's renunciation, and in the absence of proof of such a benefit that the sum stipulated for had to be paid.

If that be so ordinarily, or if ordinarily there is a question as to that, it is disposed of in the case at bar by the terms of the contract between the plaintiff and the son, which was guaranteed by the defendant and by reference made part of the contract of guaranty. It is there expressly provided that "this Subscription, when accepted by you [the plaintiff], shall not be subject to cancellation, and that you will not be required to refund any part of the money paid for said Scholarship," and "We [the plaintiff] do not refund money paid for Scholarship."

The direct effect of these two provisions is confined to the return of money paid by the scholar. But indirectly they affect the construction of the contract. If money paid for the "Scholarship" is not to be returned under any circumstances, it is plain that as matter of construction the contract between the plaintiff and the son was a contract by which the son bought a "scholarship," that is to say a right to be instructed in telephone engineering for a period of five years or until he became qualified to receive a diploma before the expiration of that time. He was not bound to study at all if he did not wish to. On the other hand

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although he was at liberty to study when he wished at any time during the five years, he was bound to pay for the "Scholarship" in instalments the last of which came due in one year and three months after the signing of the contract. What he paid for was the right to the instruction, and the sum to be paid for that right was to be paid whether the son did or did not exercise his right to be instructed.

The defendant has placed great reliance on *International Text-Book Co.* v. *Schulte*, 151 Mich. 149, 151, *International Text-Book Co.* v. *Jones*, 166 Mich. 86, *International Text-Book Co.* v. *Marvin*, 166 Mich. 660, 668, *International Text-Book Co.* v. *Roberts*, 168 Mich. 501, 506. The doctrine established by the first two of these cases and recognized by the other two is stated in these words in the second case (page 88): "It is the rule in this State that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform" brought on by the refusal of either party to go on. It was accordingly held in the first two cases in that case that the only sum which could be recovered was the damage proved by the plaintiff; and there being no affirmative proof of damages suffered by the plaintiff in these cases, it was held that the plaintiffs were entitled to nominal damages only. That doubtless is the rule in case of dependent promises. For example, where A agrees to buy of B a chattel and to pay a specified sum for it. If A refuses to go on with the contract before the title to the chattel passes, all that B can recover is damages. See for example *Barrie* v. *Quinby*, 206 Mass. 259. But see in this connection *White* v. *Solomon*, 164 Mass. 516; *National Cash Register Co.* v. *Dehn*, 139 Mich. 406, where it was held that even in case of sales of chattels the rule does not apply in case it is agreed that payment is to be made before the title passes. The case at bar does not come within the rule stated in the Michigan cases because in the contract here in question the promise to pay was an independent promise.

For these reasons we are of opinion that the exceptions taken to the refusal to give the fourth and fifth rulings asked for must

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be overruled. This conclusion was reached in *International Text-Book Co.* v. *Anderson*, 179 Mo. App. 631.

The other defence relied on is that the defendant was induced to sign the contract by false and fraudulent misrepresentations made by the plaintiff.

The defendant offered to prove that before he signed the contract he asked the plaintiff's agent this question: "'Suppose my son loses his position and gets another position in another trade so that the lessons in the old trade will be of no benefit to him, must he continue taking lessons in the old trade which will be of no benefit to him, and must I pay for them if he does not?' And the agent answered, 'No. This contract is like an insurance policy. It lapses when you stop. But while you are not required to make any further payment, you will not get your money back,'" and that in confirmation of this statement the agent pointed to the provision in capitals at the bottom of the contract: "We do not refund money paid for Scholarship." The defendant offered to prove that he relied upon this statement, and relying upon it was induced to sign the guaranty. This evidence was excluded and an exception was taken to its exclusion.

There is a provision at the top of the contract signed by the son: "Do not sign this Subscription without reading it. It is subject to acceptance by the Company at Scranton, Pa., and Agents are not authorized to change its conditions." As we have already said, the plaintiff's contract with the son was by reference made part of the contract with the defendant. The contract signed by the defendant is in these words: "I hereby guarantee the payment to you of the price agreed to be paid for the within mentioned Scholarship in accordance with the terms of the within subscription." The provision of the contract with the son that agents were not authorized to change the conditions of the printed blank was binding on him (see for example *Cannon* v. *Burrell*, 193 Mass. 534; *Colonial Development Corp.* v. *Bragdon*, 219 Mass. 170), and by reference was binding upon the defendant. The defendant agreed that the agent was "not authorized to change its [the written contract's] conditions." Whatever the written contract meant, that was the contract and the only contract that the agent was authorized to make in behalf of the plaintiff, and to that fact the defendant had agreed. Under that

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agreement of the defendant a representation by the agent as to the meaning of the written contract was not a representation which the agent was authorized to make or upon which the defendant had a right to rely. We have examined all the cases cited by the defendant and find none which requires special notice. The exception to the exclusion of this evidence must be overruled.

The case at bar is one of the few exceptions to the general rule (as to which see *Leary* v. *William G. Webber Co.* 210 Mass. 68, 74), that ordinarily it is not possible as matter of law to direct a verdict in favor of the party who has the burden of proof. In the case at bar the execution of the contract by the defendant was admitted by him, and on the facts there was no question of the amount due. Under these circumstances it was proper to direct a verdict for the plaintiff as matter of law; and the entry must be

Exceptions overruled.

SARAH SHERMAN *vs.* JOSEPH T. COLLINGWOOD.

Plymouth. January 11, 1915. — April 3, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, New trial, Exceptions, Appeal. *Rules of Court.*

In an action by a married woman, an exception by the plaintiff to a refusal by the trial judge, at the hearing of a motion by the defendant for a new trial based on newly discovered evidence, of a request not to consider a certain affidavit supporting the motion because the affidavit was based in part on the fact that a certain name was the plaintiff's maiden name and it did not appear that such was her maiden name and because the plaintiff had filed an affidavit stating that such was not her maiden name, cannot be sustained where it does not appear that there was no testimony at the trial of the case supporting the defendant's statement as to what the plaintiff's maiden name was; because the judge had all the testimony at the trial before him and it cannot be assumed in favor of the plaintiff, who in this court must sustain the burden of showing that she was harmed by the refusal of her request, that there was at the trial no testimony that her maiden name was as the defendant stated it to be.

Where, at the trial of an action by a married woman for the conversion of certain junk, the plaintiff, to prove that the junk was her property and not the property of a partnership of which her husband was one partner, testified that to get the money to start herself in the junk business she had taken money from a certain savings bank, and where, after a verdict for the plaintiff, the defendant

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files a motion for a new trial based on an affidavit of newly discovered evidence that the plaintiff for fifty years had not had a deposit in the bank in question either in her married or her maiden name, the judge at a hearing on the motion is warranted in refusing to rule that such newly discovered evidence tends only to discredit the plaintiff's testimony, because it tends to discredit and disprove her entire circumstantial story of the formation of her business and her ownership of the junk.

Where, in support of a motion for a new trial, the defendant relies upon an affidavit of newly discovered evidence that the plaintiff had no bank account in a savings bank in Boston either in her married or her maiden name during a period of fifty years, and it appears that the trial was in Plymouth, that the plaintiff on a Friday had testified that she had had such a bank account, and that the court thereafter had adjourned until Monday, a finding of the judge that the defendant might have exercised due diligence and yet not have discovered the facts alleged in his affidavit during the intermission in the trial is warranted.

Where, at the trial of an action for the conversion of a pile of junk, the plaintiff testifies as to the presence of fifteen tons of copper, lead and brass in the pile, as to the value of certain iron, and as to the absence of certain old newspapers, and recovers a verdict, and, in affidavits filed by the defendant in support of a motion for a new trial on the ground of newly discovered evidence, it is alleged that upon a careful examination of the pile made after the trial there was found to be no such copper, lead or brass, that the iron was much less in value, and that the newspapers whose presence the plaintiff had denied were present, it cannot be said that the defendant was bound to anticipate the evidence which the plaintiff gave, and a finding by the judge that the defendant had not been guilty of negligence in not ascertaining before the trial the facts set out in the affidavit is warranted.

In such a case evidence of the falsity of the testimony of the plaintiff as to the presence of copper, lead and brass does not tend merely to show that the verdict was excessive, in which case by R. L. c. 173, § 112, it should not be set aside until the plaintiff had been given an opportunity to remit what was adjudged excessive, but tends to prove the falsity of the plaintiff's entire case.

The filing, in support of a motion for a new trial on the ground of newly discovered evidence, of affidavits stating under oath merely the facts which will be shown by the newly discovered evidence satisfies the requirements of Rule 29 of the Superior Court.

It is not necessary for a judge in granting a motion for a new trial on the ground of newly discovered evidence to file a memorandum stating the facts upon which he bases his action. The granting of the motion is in itself a finding of the facts upon which it is based.

There can be no appeal to this court before a final judgment from an order of a judge granting a motion for a new trial.

LORING, J. This case is before us on exceptions taken on a motion for a new trial on the ground of newly discovered evidence.

On October 10, 1911, the defendant, a deputy sheriff, attached "certain junk" (which was at that time on the premises of the plaintiff in Plymouth) as the property of a firm consisting of her husband Abraham Sherman and one Shacat. Thereupon the

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plaintiff sued the deputy sheriff for conversion of the junk (on the ground that it was her property) and on September 17, 1912, obtained a verdict for $1,500. A motion for a new trial, "assigning the ordinary reasons therefor," was made and waived in open court. On October 12, 1912, the defendant filed the motion for a new trial now in question, founded upon newly discovered evidence. This was accompanied by four affidavits. A fifth affidavit was filed by the plaintiff. It is stated in the bill of exceptions that the judge* "granted the motion for a new trial upon the affidavits presented and upon the memorandum, a copy of which is hereto annexed." The memorandum is in these words: "The motion for new trial on the ground of newly discovered evidence is granted on the ground that, in my judgment, justice cannot be done between the parties without hearing the evidence submitted in the affidavits and referred to in the motion before the case is finally determined."

The motion for a new trial was founded on three facts in substance as follows: [First:] At the trial the plaintiff introduced evidence that from a date not mentioned (but apparently about 1905 or 1906), she began the business of buying and selling junk and that she carried on that business continuously on the premises in question until after the attachment here complained of. She then testified that she obtained the capital for this business by withdrawing from the Boston Five Cents Savings Bank some $500 which she had saved from her earnings and which she had on deposit in that savings bank. As to this the defendant discovered after the trial that there had been no deposit in the Five Cents Savings Bank either in the name of Sarah Sherman or Sarah Toabe, her maiden name, for a period of fifty years before 1907. This appeared from an affidavit of one Milligan filed with the motion. [Secondly] The plaintiff put in evidence that at the time of the attachment there were in the pile of junk ten or fifteen tons of mixed junk consisting of copper, lead and brass worth $75 or $80 a ton; that said junk was "still there at the time of the trial;" also "that there was certain iron in said pile, both at the time of the alleged conversion and at the time of the trial, valued at $13.50 per ton." As to this the defendant discovered

* *Dubuque*, J., who made an order granting a new trial. The plaintiff alleged exceptions.

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after the trial (by an examination of the pile made by one Chambers and one Burke) that there was not any copper, lead or brass in the pile at all, and that the iron was worth from $9 to $10 in place of $13.50 a ton. The affidavits of Chambers and Burke were filed with the motion. It also appeared from these affidavits that apart from the paper in it the pile was worth from $552 to $620. The third specification of newly discovered evidence was in connection with the testimony given at the trial by the plaintiff's husband that there was in the pile of junk about twelve tons of paper and that these papers were "in that pile at the time of the alleged conversion and were still there at the time of the trial," and that no papers were added to the pile in controversy during the time of the partnership between Sherman and Shacat, to wit from March, 1911, to October, 1911. As to this it appeared from an examination made since the trial by Burke and Smith that there were bundles of newspapers in the pile dated in April, May, June, July, August and September, 1911. Their affidavits were filed with the motion.

We take up the exceptions in the order in which they are stated in the record.

The first exception in the bill of exceptions is stated in these words: "The plaintiff claimed at the hearing of said motion for new trial that the affidavit of Thomas Milligan should not be considered, and that a new trial should not be granted on said evidence" because if the evidence in the affidavit were true "its sole tendency was to impeach the credit of a witness" and because the testimony sought to be impeached by Milligan's affidavit having been given on a Friday and the case adjourned until the following Monday, the defendant had full opportunity during the intermission to ascertain the facts as to the deposit of the plaintiff in the Boston Five Cents Savings Bank. Both of these requests were refused and an exception taken.

The plaintiff now seeks to support her request that the affidavit of Milligan should not be considered on two grounds: First, that it does not appear in the affidavit that Sarah Toabe was the maiden name of the plaintiff, and second, because the plaintiff introduced an affidavit from which it appeared that her maiden name was Sarah Toibb; that her father so spelled his name although her brother spells his name Toabe. It is true that there

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is nothing in the record before us which shows that the maiden name of the plaintiff was Toabe. But the judge who heard the motion for a new trial had before him all the testimony which was given at the trial of the case, and we cannot assume that it was not testified to there that the plaintiff's maiden name was Sarah Toabe. There is no statement in this bill of exceptions that there was not evidence to that effect at the trial of the cause. The burden is on the excepting party to make out error and we cannot say that there was not evidence before the judge on this point.

The second ground put forward by the plaintiff for not acting upon the affidavit of Milligan is that the facts proved by him went only to impeach the credit of a witness. That is not so. In making out her case the plaintiff went into a circumstantial story as to how she got the money to carry on the junk business, in the course of which (according to her contention) she acquired the pile of junk here in question. As part of that story she testified that she got the capital for the business by drawing out $500 from the Boston Five Cents Savings Bank. The fact (if it was a fact) that she never had $500 in the Boston Five Cents Savings Bank went to disprove the whole story which she told as to her ownership of the pile of junk in question. In other words the evidence went to negative the substance of her testimony and not merely to impeach the credit of a witness.

The third ground on which the plaintiff contends that no action should be taken upon Milligan's affidavit is that inasmuch as the testimony as to withdrawing this deposit was given on a Friday and the court adjourned until the following Monday the judge, as matter of law, could not find as a fact that the defendant would not have ascertained the facts as to the deposit if he had used due diligence. To that contention we cannot assent. The trial was in Plymouth County. We think that the judge could find as a fact that the defendant might have exercised due diligence and yet not have discovered this fact during the intermission.

The last contention made by the plaintiff as to Milligan's affidavit is that it was fully met by the counter affidavit from which it appeared that the plaintiff's maiden name was Toibb, not Toabe. The short answer to this is that the judge was not bound

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to believe it. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. The counter affidavit would have been more persuasive if it had shown that although Sarah Toabe did not have a deposit in the savings bank in question Sarah Toibb did. There is no suggestion in the affidavit that such was the fact.

The plaintiff requested the court to rule that the other affidavits did not constitute ground for a new trial because as matter of law the facts covered by them would have been learned by the defendant if he had used due diligence. This was refused and an exception taken. This exception must be overruled. The defendant was not bound to anticipate that the plaintiff would undertake to recover $750 to $1,200 for ten or fifteen tons of junk consisting of copper, lead and brass in the pile worth $75 or $80 a ton, when in fact there was not a pound of such junk in the pile. Nor was he bound to anticipate that she would undertake to recover for paper in the pile all, of which she swore was hers, because none had been added to it since her husband went into the junk business with Shacat in March, 1911, when in fact there were newspapers in the pile bearing dates in every month between the date when the partnership was formed and that when the attachment was made. We are of opinion that the judge was warranted in finding that the defendant was not guilty of negligence in not ascertaining before the trial the facts set forth in their affidavits.

The last exception taken by the plaintiff is stated in these words: "The court granted the motion for new trial upon the affidavits presented and upon the memorandum, a copy of which is hereto annexed, and to such granting the plaintiff excepts."

The plaintiff's first contention in support of this exception is that all the facts relied on in the motion for a new trial here in question were not supported by affidavit within Rule 29 of the Superior Court, as to which see *Borley* v. *Allison*, 181 Mass. 246. All the facts which constituted newly discovered evidence were set forth in the affidavits which accompanied the motion. In our opinion that was a compliance with the rule. See *Soebel* v. *Boston Elevated Railway*, 197 Mass. 51.

The next contention of the plaintiff not already dealt with is that the memorandum of the judge did not contain a finding of

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the facts which must be found by him to grant a new trial on the ground of newly discovered evidence. But that was not necessary. Granting the motion is in itself a finding by the judge of the facts set forth in the motion. Even if the judge finds that the evidence was material and the party asking for the new trial had not been negligent in not finding it before or during the trial, the judge is not bound to grant a new trial. A judge cannot grant a motion for a new trial on the ground of newly discovered evidence unless he finds these facts. But when he has found these facts he is not bound to grant the motion. In that event the granting of the motion is still a matter lying within his discretion. The statement of reasons made by the judge in his memorandum doubtless was intended to state why he exercised his discretion as he did and to comply with St. 1911, c. 501.

In addition the plaintiff contends (as we understand her) in support of this exception that the affidavits of Chambers and Burke go to the amount to be recovered only, and so the case is within R. L. c. 173, § 112. But that is not so. These as well as the other affidavits go to show that the plaintiff's story was a false one. If she did not have the $500 in the savings bank, she did not get the money necessary to set up a junk business in the way in which she said she got it. If nearly half of the junk (in value) which she claimed was in the pile was not there at all, that fact was strong evidence of the falsity of her story, and her story that the pile of junk existed as it did at the time of the trial before her husband's firm was created was shown to be false by the newspapers found in it.

The last contention is that there ought to have been evidence that the pile examined by the affiants was the pile attached by the defendant. In his affidavit Chambers says that the plaintiff was present when he made the examination and that he was informed that the property examined by him was the property attached by the defendant. Burke in his affidavit says that the plaintiff showed him the pile of junk "and said that that was the property attached by the deputy sheriff, Joseph T. Collingwood." Smith in his affidavit says that he examined the pile of newspapers "which was pointed out to us by Mrs. Sarah Sherman as the pile of newspapers which she claimed."

The plaintiff has filed an elaborate brief not addressed to the exceptions taken by her and founded for the most part on decisions

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in other States. The law of this Commonwealth involved in the case is simple and well settled. It would serve no useful purpose to go into a discussion of the rule in other jurisdictions.

We have considered all the contentions put forward by the plaintiff as we understand them. But we have been embarrassed by the fact that her argument is not addressed to the exceptions which she took.

The plaintiff has undertaken to take an appeal from the order granting a new trial. The appeal must be dismissed. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31. *Farris* v. *St. Paul's Baptist Church,* 216 Mass. 570. *Zuccaro* v. *Nazzaro,* 216 Mass. 289.

Exceptions overruled.
Appeal dismissed.

J. H. Blanchard, (*H. C. Blanchard* with him,) for the plaintiff.
M. Collingwood, for the defendant.

JULIET F. WHITE *vs.* BEVERLY BUILDING ASSOCIATION.

Essex. January 21, 22, 1915. — April 3, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Joint Tortfeasors. Neither Party. Practice, Civil, Entry of "neither party." *Pleading, Civil,* Variance. *Accord and Satisfaction. Negligence,* Of one owning or controlling real estate.

A mere entry, by agreement of the parties in an action of tort against one of two joint tortfeasors, of "Neither Party, no further suit to be brought for the same cause of action" is not an adjudication of the case nor a release and discharge of the defendant and does not operate to discharge the other joint tortfeasor from liability.

Evidence, that the plaintiff in an action of tort against one of two joint tortfeasors agreed to an entry in the action of "neither party" and that no further action should be brought for the same cause, upon the promise of an insurance company which had insured the defendant against the liability that it would pay to him $250, and that no part of that amount had been paid, will not warrant a finding of an accord and satisfaction that will bar an action by the plaintiff against the other joint tortfeasor.

An accord between a plaintiff and one of two joint tortfeasors, without satisfaction, is not a bar to an action against the other joint tortfeasor.

Where, in an action against the owner of a building by an employee of a tenant on the fourth floor of the building for personal injuries caused by the plaintiff falling down a flight of steps in a stairway used in common by all the tenants in the

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building, there was no evidence that there was any way of passing to and from the fourth floor other than these stairs, and there was evidence tending to show that the plaintiff had worked for her employer for more than two years, that when the plaintiff fell the stairway was somewhat dark, that she fell because, when she took hold of a hand rail maintained there by the defendant, it came out of the bracket which held it in place and did not support the plaintiff as she supposed it would, and that the coming out of the bracket was due to a defective condition into which it had been allowed to fall by the defendant since the beginning of the term of the lease to the plaintiff's employer, findings are warranted that the plaintiff was in the exercise of due care and that the defendant was negligent.

Where the declaration in an action of tort for personal injuries suffered by the plaintiff falling down a flight of stairs in a common stairway in a building controlled by the defendant alleges that the cause of the plaintiff's injuries was negligence of the defendant "in allowing and maintaining said halls, landings, and stairways to be in such unsafe and dangerous condition, and so dark and insufficiently lighted," and the trial judge rules that the defendant owed the plaintiff no duty to light the stairway, so that there could be no recovery on that ground, it is not a variance for the plaintiff to rely solely on evidence tending to show that the fall was due to the defective condition of the hand railing of the stairway.

TORT for personal injuries caused by falling down a flight of stairs in a building owned by the defendant. The declaration was in two counts, which are described in the opinion. Writ dated August 3, 1909.

In the Superior Court the case was tried before *Hardy*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant asked the judge to rule as to each count of the declaration that on all of the evidence the plaintiff could not recover on that count, and to give the following rulings:

"3. Upon all the evidence, the plaintiff was not in the exercise of due care.

"4. Upon all the evidence the defendant was not negligent."

"9. There is no sufficient evidence that the alleged injury was due to a defect or want of repair of a rail resulting from any negligence for which the defendant was liable."

"13. Upon all the evidence the settlement of the plaintiff's suit against the Blake-Allen Company, alleged to be for the same cause of action as the suit against this defendant, and the entry of an agreement for 'neither party' and the judgment thereon is a bar to this action against this defendant."

The rulings were refused. There was a verdict for the plaintiff in the sum of $1,350; and the defendant alleged exceptions.

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E. S. Abbott, for the defendant.

H. R. Mayo, for the plaintiff.

CROSBY, J. The plaintiff was injured by falling down a flight of stairs in a four-story building owned by the defendant and leased by it to various tenants. She was employed by the Blake-Allen Company, one of the defendant's tenants, who occupied the fourth or top floor of the building.

1. The plaintiff brought an action against her employer, the Blake-Allen Company, to recover for the injuries so received by her, and subsequently brought this action against this defendant to recover for the same injuries.

While both actions were pending in the Superior Court an agreement for the following entry in the case against the Blake-Allen Company was made: "Neither party, no further suit to be brought for the same cause of action." This agreement was duly signed by the counsel for the plaintiff and for the defendant, and filed in court. Upon the outside of the agreement was indorsed: "Agreement for Judgment."

Notwithstanding the indorsement the agreement must be construed in accordance with its terms; plainly it was not an agreement for judgment and cannot be so considered. It is what it purports to be, — an agreement for the entry of "Neither party," with the additional agreement that no further suit is to be brought for the same cause of action.

The defendant earnestly contends that this agreement is a bar to the present action on the ground that the defendant and the Blake-Allen Company were joint tortfeasors; that the Blake-Allen Company was released and that such release operated to discharge this defendant. If we assume, without deciding, that the Blake-Allen Company and the defendant were concurrent or joint tortfeasors, still the entry of the agreement did not operate to discharge the defendant. The entry of "Neither party" in an action does not indicate that the cause has been adjudicated; it means nothing more than that neither party appears to prosecute or defend the action, and is equivalent to a non-suit and default by consent of the parties, after which no judgment can be rendered by the court. It amounts to an abandonment of the action; it is not a judgment and is no bar to a future action. *Marsh* v. *Hammond*, 11 Allen, 483.

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The defendant relies upon the language of Lord, J., in *Blanchard* v. *Ferdinand*, 132 Mass. 389. He there said (p. 391): "The entry of 'neither party' upon the record is the appropriate final disposition of the action." In that case it was held that a judge at a subsequent term had no power to order the entry of "Neither party" stricken off and the case brought forward. While such an entry is a final disposition of the case, it is not a bar to a subsequent action to recover upon the same cause of action. *Marsh* v. *Hammond*, *supra*.

Nor can the agreement be construed as a release. It merely amounts to an agreement not to sue again for the same cause of action. The distinction between an agreement not to sue and a release of one of two or more joint tortfeasors is clearly pointed out in *Matheson* v. *O'Kane*, 211 Mass. 91.

The action is not barred upon the ground of accord and satisfaction. The only evidence relative to the disposition of the case against the Blake-Allen Company was the testimony of the plaintiff, and the statement in open court of her counsel that he had agreed to the entry in that case upon the promise of the representative of an insurance company (which had insured the Blake-Allen Company), to pay $250. He further stated that no part of the amount agreed upon in settlement ever had been paid, and there was no evidence of such payment. Under these circumstances it could not be found that there had been an accord and satisfaction. An accord without satisfaction is no defence to an action. *Herrmann* v. *Orcutt*, 152 Mass. 405. *New York, New Haven, & Hartford Railroad* v. *Martin*, 158 Mass. 313, 315. *Anglo-American Land, Mortgage & Agency Co.* v. *Dyer*, 181 Mass. 593, 598. *Prest* v. *Cole*, 183 Mass. 283.

At common law even a judgment against one tortfeasor without satisfaction is not a bar as against other joint wrongdoers who are sued separately. *Cameron* v. *Kanrich*, 201 Mass. 451.

It follows that the writ, pleadings and agreement in the action of the plaintiff against the Blake-Allen Company were inadmissible and the exception to the exclusion of this evidence cannot be sustained. For the same reason the defendant's thirteenth request could not have been given.

2. The plaintiff testified, in substance, that as she came down the stairs she took hold of the hand rail on the left side of the

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stairway, and that as she did so the rail came out of the bracket which held it in place and she fell to the foot of the stairs. There was evidence that this was a common stairway, used by the different tenants of the defendant, and was in its control; and that the plaintiff had worked for the Blake-Allen Company in the same place for more than two years before the accident. There was no evidence to show that during this time there was any other way of passing to and from the fourth floor of the building. There was evidence to show that at the time the plaintiff fell the stairway was somewhat dark. Plainly it could not be ruled as matter of law that the plaintiff was not in the exercise of due care; that question was for the jury. *Fitzsimmons* v. *Hale*, 220 Mass. 461. *Ward* v. *Blouin*, 210 Mass. 140. *Faxon* v. *Butler*, 206 Mass. 500. *Andrews* v. *Williamson*, 193 Mass. 92. *Wilcox* v. *Zane*, 167 Mass. 302. *Mahoney* v. *Dore*, 155 Mass. 513.

3. The defendant owed to its tenant, the Blake-Allen Company, as to the common stairway in the control of and maintained by it (the defendant), the duty to see that this stairway was kept in as good repair as it appeared to be in when the tenancy began; but the defendant's obligation to the plaintiff as to the condition of the stairway was not greater than to the tenant in whose right the plaintiff was using it at the time of the accident. *Domenicis* v. *Fleisher*, 195 Mass. 281. There was evidence which would have warranted a finding that the hand rail had been allowed to become defective, that when the plaintiff took hold of it it gave way and caused her to fall to the bottom of the stairs; this would warrant a finding of negligence on the part of the defendant, for the consequences of which it would be responsible. *Fitzsimmons* v. *Hale*, 220 Mass. 461. *Domenicis* v. *Fleisher*, *supra*.

4. We are of opinion that there was not a variance between the allegations and the proof. Both counts of the declaration contain an allegation, in substance, that the plaintiff was injured by reason of the defendant's negligence "in allowing and maintaining said halls, landings, and stairways to be in such unsafe and dangerous condition, and so dark and insufficiently lighted"; and although the presiding judge ruled that the defendant owed the plaintiff no duty to light the stairways and that the plaintiff could not recover upon that ground, still we are of opinion that upon the allegation

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that the stairways were negligently maintained in an unsafe and dangerous condition, the plaintiff could prove that the hand rail was in an unsafe and defective condition, by reason of which she was injured.

For the reasons already stated, the defendant's first, second, third, fourth and ninth requests could not be given.

We are of opinion that the case was properly submitted to the jury, and that the entry must be

Exceptions overruled.

FLORENCE J. MACLELLAN & another *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 13, 1915. — April 14, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Employer's liability. *Evidence*, To prove ownership, Materiality. *Practice, Civil*, Exceptions.

An action under the employers' liability act against a street railway company for the death without conscious suffering of a lineman employed by the defendant alleged to have been caused by a defect in the ways, works, appliances and mechanism used in connection with the defendant's business cannot be maintained on those allegations where it appears that the cause of the death was the breaking of a guy pole while the deceased was working upon it and the evidence does not warrant a finding that the pole belonged to the defendant.

In such an action, a finding that the pole belonged to the defendant is not warranted where the only evidence on that subject was testimony of a witness for the plaintiff that it was a "guy stub" supporting "Edison poles" and that the defendant had no wires upon it, an affirmative reply of the same witness to a question, whether a guy wire which the witness and fellow workmen were taking from the pole was a guy running to the Edison pole and evidence tending to show that two days after the accident the broken stub pole was put on a team of the defendant and carried away, although, in the absence of the other evidence, evidence tending to show merely that after the pole was broken it was carried away on a team of the defendant might have warranted a finding that the pole was its property.

A foreman in charge of a number of linemen of a street railway company (who is admitted to be a superintendent of the defendant within the meaning of the employers' liability act), in giving to a lineman of sixteen years' experience an order not in itself negligent to go upon a certain wooden pole called a "guy stub" pole to remove a guy from it, is under no duty first to inspect the pole and to give a warning or instructions as to how the work should be done; and, if he

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fails to make such inspection and to give any such warning or instruction and the employee is injured by the breaking of the pole because of a decayed condition, the company cannot be held liable for the injuries by reason of negligence on the part of the superintendent, whether the company owned the pole or not.

In an action under the employers' liability act against an employer for causing the death of an employee, where it is alleged that the death was caused by a failure of a superintendent of the defendant to give instructions to the employee as to a proper method in which certain work should be done and that therefore the employee used a wrong method and was injured, and where it appears that the employee was so experienced that the superintendent was under no duty to give him instructions, a witness for the plaintiff, qualified as an expert, need not be permitted to testify as to what was a proper method for the employee to use, because such evidence is immaterial and properly may be excluded. In this case the witness was permitted to state that the method adopted by the employee was improper, and it therefore was held that, if the evidence as to the proper method was competent for any purpose, the plaintiff was not harmed by its exclusion.

CROSBY, J. The substituted declaration in this case contains two counts under the employers' liability act. One alleges a defect in the ways, works, appliances and mechanism used in connection with the business of the defendant, and the other alleges the negligence of a person in the service of the employer, whose sole or principal duty was that of superintendence.

The plaintiffs are daughters of Alexander MacLellan and seek to recover for his instantaneous death while in the employ of the defendant.

It appeared that the deceased was an experienced lineman, who had worked as such for various electric light companies and a telephone company for sixteen or eighteen years before his death; that most of his work had been on electric light and telephone poles, and that he was not a ground man, so called, but his principal work had been upon such poles.

On the day of the accident the defendant was changing its wires to a new location on Southampton Street in Boston. The deceased and some other linemen, in charge of one Scanlon (who it was admitted was a superintendent under the employers' liability act), were present, and Scanlon told the deceased and one Barnes to move a guy wire, which ran from a pole referred to in the record as "D," and to attach it to a telephone pole on the southerly side of the street a few feet away from pole "D." This pole "D" was called a "stub." This "stub" pole "D" was about

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sixteen feet tall above the ground, and ten inches thick at the butt. Scanlon gave no instructions as to how the work should be done.

Barnes and the deceased then undertook to remove the guy wire. Barnes placed a ladder against the "stub," climbed it, carrying a block and falls, and attached it to the guy wire; then he climbed down and set up the falls, making them fast to a fence. He then climbed the ladder again, taking with him bolt cutters, and after cutting the guy descended to the ground and slacked off the falls. While Barnes was engaged in pulling the guy wire down from the return wires where it had lodged, the deceased climbed the ladder to remove from the "stub" the "stopper," so called, which attached the block and falls to the "stub." Immediately afterwards the "stub" or pole broke off two or three inches below the ground, which was frozen, and the deceased was thrown over a fence on to some rocks, and was instantly killed.

There was evidence to show that where the pole had broken below the surface of the ground it was decayed. The witness Barnes testified that the stub "D," upon which MacLellan was when he was killed, was a guy stub supporting Edison poles, and that the defendant company had no wires upon it. After the witness Barnes had so testified, the presiding judge * stated, "That was an Edison guy?" in reply to which the counsel for the defendant said, "Edison guy." The following question was then put to the witness: "This was a guy running to the Edison pole?" Answer, "Yes, sir." The witness further testified that upon the following Monday (the accident occurred on Saturday, March, 2, 1912) he cut the back guy from the stub pole "D" and put the pole on a team of the defendant and it was carried away. This is all the evidence upon the question of the ownership of stub pole "D." It falls far short of justifying a finding that the pole belonged to the defendant, although if the only evidence upon this question had been that that pole was carried away by the defendant an inference perhaps might have been warranted that the pole was its property. As there is no evidence to warrant a finding that the defendant was the owner of the pole "D," the plaintiffs are not entitled to recover under the first count.

* The case was tried before *White*, J., who ordered a verdict for the defendant and reported the case for determination by this court.

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The plaintiffs contend that the order of the defendant's superintendent Scanlon to the deceased and to Barnes to remove the guy wire from the pole without instructions as to how it should be done was a negligent order. The undisputed evidence shows that the deceased was a man of large experience in work of this kind. He had worked upon poles in the construction and repair of electric lines for several years. It must have been obvious to him that wooden poles used for supporting wires, after having been set for a long time in the ground, would become decayed and defective. Indeed, it would seem to be a matter of common knowledge that there would be such deterioration. He must have known that it was practicable to test such poles before climbing them, to ascertain whether they were safe or otherwise. There was no evidence to show that the defendant made any inspection or test of this pole to ascertain whether it was safe before the deceased was set to work upon it, or that the deceased relied upon any such inspection or test. Nor was there any evidence to show that there was any practice on the part of the defendant or its superintendent to make such inspection. The deceased must have known that no inspection of the pole in question had been made by his employer. He could judge as well as anybody whether it was safe to go upon it without examination. It cannot be found that the order of Scanlon was any assurance to him, under the circumstances, that the pole was safe for him to work upon. As between the plaintiffs and the defendant, the defendant was under no obligation to inspect poles owned by it to see whether they were decayed, and there is therefore no evidence of negligence on the part of the defendant; and this is equally true where the pole is not owned by the employer. *McIsaac* v. *Northampton Electric Lighting Co.* 172 Mass. 89.

Nor can it be found that Scanlon was negligent in failing to include in his order to cut the guy wire directions as to how it should be done, because from his experience the deceased must have known the proper way in which to do the work and needed no instructions as to the manner of its performance. There was no evidence to warrant a finding that the order of Scanlon was a negligent order. *Tanner* v. *New York, New Haven, & Hartford Railroad*, 180 Mass. 572.

The case is plainly distinguishable from *McCoy* v. *Westborough*,

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172 Mass. 504; *Chisholm* v. *New England Telephone & Telegraph Co.* 185 Mass. 82; *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322; *Carroll* v. *Fore River Ship Building Co.* 208 Mass. 296.

As there is no evidence to show that the defendant was negligent we need not consider whether the deceased was in the exercise of due care.

One Garrick, a witness called by the plaintiffs as an expert, was asked as to the proper method of testing a pole when the ground was frozen. He also was asked as to what order should be given to a lineman to change a guy, and as to whether certain orders recited in the questions would be proper. These questions were excluded by the presiding judge as immaterial, but the witness was permitted to testify that the method adopted by the deceased and his fellow workmen in changing the guy was improper. In view of this testimony and taking into consideration the long experience of the deceased in doing similar work, we are of opinion that the evidence was excluded rightly. If for any purpose it could have been considered competent, we are of opinion that its exclusion did not affect injuriously any substantial rights of the plaintiffs. St. 1913, c. 716, § 1.

The exceptions to the exclusion of evidence cannot be sustained. In accordance with the terms of the report judgment is to be entered for the defendant on the verdict.

So ordered.

J. C. Woodman, (*C. P. Hanlon* with him,) for the plaintiffs.

F. M. Ives, for the defendant.

JOHN J. O'HARE, executor, *vs.* RALPH W. GLOAG.

Suffolk. January 22, 1915. — April 14, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Causing death. *Practice, Civil*, Exceptions, Conduct of trial. *Evidence*, Competency. *Automobile*. *License*. *Witness*, Cross-examination.

Where in an action by an executor under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's testatrix, the declaration contained no allegation that the testatrix was survived by any child or children or any

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next of kin and this subject was not mentioned at the trial, it is not open to the defendant, after he has obtained a verdict and the plaintiff has alleged exceptions, to contend at the argument of the plaintiff's exceptions that it does not appear that anybody is in existence for whose benefit the action could be brought.

It seems that the failure of the holder of a license to operate an automobile to disclose, in answer to a question calling for the disclosure of any physical incapacity or infirmity when he made his application to the highway commission for the license, the facts that his right leg had been amputated two or three inches above the knee and had been replaced by an artificial one and that his left leg was withered, does not affect the validity of his license in relation to other travellers on the highway, although it may be a ground for the revocation of the license by the highway commission. In the present case the person holding a license under such circumstances had a right to operate his automobile without a license because he had with him a licensed operator carrying his license, thus satisfying the requirement of St. 1909, c. 534, § 10.

In an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, after the plaintiff had been allowed improperly to show that the defendant in his application to the highway commission for a license to operate his automobile had failed to answer a question calling for the disclosure of any physical incapacity or infirmity, the judge, subject to the plaintiff's exception, permitted the defendant to explain his understanding of the meaning of the question in the application in connection with the answer that he made to it. *Held*, that the plaintiff's exception could not be sustained; because the application which the defendant improperly was trying to interpret was incompetent against him and should not have been admitted in evidence.

The limits of cross-examination are subject to the discretionary regulation of the presiding judge.

An exception, which originally had been included in a bill of exceptions, here was not considered, because it had been stricken out from the bill of exceptions by an amendment allowed by the judge which was "agreed to by both parties."

In an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, the declaration contained a count alleging in substance that the defendant was physically unfit to operate an automobile by reason of his infirmities and disabilities. It appeared that at the time of the accident the defendant wore an artificial leg, his right leg having been amputated two or three inches above the knee, and that his left leg was withered. Subject to the plaintiff's exception the defendant was permitted to introduce the testimony of a number of witnesses as to the manner in which the defendant operated his automobile during the two years after the accident. The defendant had testified at the trial, and in the presence of the jury was subjected to tests as to the use which he had of both legs, and the jury could have found that the defendant's physical condition had not changed materially from the time of the accident to the time of the trial. *Held*, that the evidence was admissible to show the manner in which the defendant operated his automobile within a reasonable time before and after the accident for the purpose of rebutting the inference that at the time of the accident he was unfit to stop, regulate or control an automobile on account of his disabilities, but that it was not admissible for the purpose of showing that he was operating the automobile carefully at the time of the accident.

In an action for causing the death of the plaintiff's testatrix by running into her

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with an automobile owned and operated by the defendant, evidence introduced by the defendant, that the defendant after the accident drove his automobile carefully and that he was a slow and careful driver, clearly is incompetent, and an exception of the plaintiff to the admission of such evidence here was sustained, although the judge had ruled that such evidence was incompetent to show that the defendant operated his automobile carefully, because the admission of the incompetent evidence was not referred to in the judge's charge and the jury were not instructed to disregard it, so that this court could not say that it did not have a tendency to prejudice the substantial rights of the plaintiff.

CROSBY, J. This is an action brought under R. L. c. 171, § 2, as amended by St. 1907, c. 375, and St. 1911, c. 31, to recover for the conscious suffering and death of the plaintiff's testatrix, who was struck by an automobile operated by the defendant and received injuries which resulted in her death.

1. There was evidence upon the question whether the deceased consciously suffered as a result of her injuries, and that question properly was submitted to the jury.

2. The defendant contends that there was no evidence from which it could have been found that the plaintiff was entitled to recover for the death of his testatrix. There is no allegation in the declaration that the testatrix was survived by a child or children, or by any persons as next of kin. There is nothing in the record to show that this question was raised at the trial. The case comes before us only upon the exceptions of the plaintiff. We do not think under the circumstances that this question properly can be raised at this time by the defendant.

The case was submitted to the jury by the trial judge * upon counts for conscious suffering and for death, and a verdict was returned for the defendant upon both counts. The instructions upon these issues seem to have been correct and sufficient, although the plaintiff strenuously contends to the contrary. Still since no exception was taken to the charge, no question as to its correctness can be raised at this time.

3. The exceptions to the refusal of the judge to give the plaintiff's requests numbered 17, 18, 19, 20, 21, 22 and 23 cannot be sustained. These requests relate to the failure of the defendant, in his answer to question number 12 in the form of application for an operator's license, to disclose to the Massa-

* *Brown*, J.

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chusetts highway commission in his application for a license that he had any physical incapacity or infirmity. His failure to make such disclosure did not of itself render the license void, nor was he a trespasser in operating the automobile upon the highway. While the failure of an applicant to make such disclosure might be a sufficient ground for revoking his license, still, having been regularly issued, it is valid unless and until revoked by proper authority. It follows that none of the requests properly could have been given. Besides the evidence was undisputed that at the time of the accident the defendant was accompanied by one Tenney, who was a licensed operator and had his license with him at the time. The judge properly instructed the jury that the defendant had a right to run his car although not licensed, provided he had a licensed operator with him. St. 1909, c. 534, § 10.

4. The defendant was allowed, subject to the plaintiff's exception, to explain his understanding of the meaning of question number 12 in the application for a license to operate an automobile, in connection with the answer which he made to that question. But as the application for a license was incompetent and should not have been admitted, we are of opinion that the exception should be overruled.

5. The question put by the defendant to the witness Scannell * on cross-examination was admissible within the discretion of the judge.

6. The plaintiff in his brief has argued that the question put to the defendant, "And how long had you been operating an

* This witness was called by the plaintiff and had testified in regard to the difficulty that a man with an artificial leg extending above the knee would have in operating an automobile. On cross-examination the defendant asked the witness, after a statement of the defendant's extensive experience in operating an automobile, "assuming I have driven to that extent, would you then say that I was able properly to operate a runabout of the year 1912, assuming its equipment to be in good order?" The plaintiff excepted to the question, and the judge admitted it.

The witness answered: "Assuming all the conditions to be as you have given them, I should say that . . . the common sense principle, that actions speak louder than words, was the answer." The defendant then asked:

"And that therefore I was able properly to run that runabout car?" and the witness answered, "So it would seem from past performance, yes."

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automobile?" was admitted, together with the answer, subject to the plaintiff's exception. In the bill of exceptions as originally filed, it is recited, just before this question was put, that "Subject to the plaintiff's objection and exception, the witness then testified as follows." The bill of exceptions afterwards was amended by striking out the words "subject to the plaintiff's objection and exception." The record shows that "This amendment is agreed to by both parties." Although originally it appeared by the bill that this exception was saved, the statement was stricken out by the allowance of the amendment.

7. The plaintiff in his brief has argued that the defendant's testimony as to his instructions and experience, and also as to his study of the construction and operation of automobiles, was admitted improperly. This testimony is found on pages 15 and 16 of the record, and by reason of the amendment above referred to was not excepted to. The only testimony which was admitted subject to exception appearing on pages 15 and 16 was the testimony of the defendant as to his understanding of question number 12 in the application for a license above referred to.

8. The plaintiff excepted to the admission of the testimony of several witnesses as to the manner in which the defendant operated his automobile during the two years after the accident which resulted in the death of the testatrix. The fifth count of the declaration contained an allegation "that said injuries were caused by reason of the defendant's careless and negligent operation of said automobile, as well as by his physical unfitness to operate an automobile." The evidence showed that at the time of the accident the defendant wore an artificial leg, his right leg having been amputated two or three inches above the knee, and that at that time his left leg was withered. The plaintiff contends that there was no evidence to show that the physical disability of the defendant was the same two years afterwards as at the time of the accident, and that consequently this evidence as to the manner in which he operated his automobile, aside from other reasons, was incompetent. The jury fairly could have assumed that the condition of the right leg had not changed during this period. Besides the defendant testified at the trial, and was subjected to certain tests in the presence of the jury as to the use which he had of both legs, from all of which the jury could

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have found that the defendant's physical condition had not changed materially from the date of the accident down to the time of the trial. We are of opinion that the allegation in the fifth count of the declaration was in effect an allegation that the defendant was physically unfit by reason of his infirmities and disabilities to operate an automobile. In view of this allegation in the fifth count we are of opinion that evidence was admissible to show the manner in which the defendant operated his automobile within a reasonable time before and after the accident, not for the purpose of showing that he did operate it carefully at the time of the accident, but for the purpose of rebutting the inference that he was physically unfit to operate, stop, regulate or control an automobile at the time of the accident on account of his disabilities.

One Lydon, a police officer, called by the defendant, was asked upon direct examination what he had observed as to whether or not the defendant's "manner and method of operating an automobile was careful and competent." This question was admitted by the judge subject to the plaintiff's exception. The witness answered, "Always a very careful man in the Park system." The judge, upon objection, ordered the answer stricken out upon the ground that it amounted to a characterization of the defendant's manner of operating an automobile. Notwithstanding this ruling of the presiding judge, this witness afterwards, on direct examination, was permitted to testify, subject to the plaintiff's exception: "When I ever met you in the Park coming along very careful, . . . you . . . always stopped just this side of Castle Island Bridge, and careful as I thought." The defendant called one Bouchet, also a police officer, who was asked by the defendant as to what he (the witness) had observed as to his (the defendant's) operation of an automobile. The witness answered: "My observations were that you were always a slow operator." One O'Connor, a police officer, called by the defendant, after testifying as to what he had observed as to the defendant's manner of operating his car, said: "And I never had any occasion to caution you at all." One Meagher, a witness also called by the defendant, testified on his direct examination in reply to questions as to what he had observed of the defendant's methods in running an automobile, "Well, you always impressed me as

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running an automobile very carefully." This witness also testified: "Just as I say, I have observed you run along so very slowly that I wondered how an accident could happen." All of the foregoing evidence was admitted subject to the exception of the plaintiff. This evidence was clearly incompetent and allowed the witnesses called by the defendant to testify that he was a slow and careful driver. While the allegation contained in the fifth count made competent evidence to show that it was physically possible for the defendant to manage, control and operate an automobile, and as bearing upon that question, the testimony of persons who had observed him actually operating his machine was admissible, on the other hand it was manifestly incompetent for witnesses to testify that he was careful or otherwise. *Lang* v. *Boston Elevated Railway*, 211 Mass. 492. *McDonald* v. *Savoy*, 110 Mass. 49.

Although the presiding judge ruled that it was incompetent to show that the defendant operated his automobile carefully, when the witness Lydon so testified, still it appears that afterwards the defendant was permitted to offer similar testimony from three other witnesses, all subject to the exception of the plaintiff. The admission of this incompetent evidence was not referred to in the charge, the jury were not instructed to disregard it, and we are unable to say that it did not have a tendency to prejudice the substantial rights of the plaintiff. St. 1913, c. 716. *Allen* v. *Boston Elevated Railway*, 212 Mass. 191. We are of opinion that the exceptions to the admission of the evidence above referred to must be sustained. As there seems to have been no other error in the conduct of the trial, all other exceptions are overruled. It follows that the entry must be

Exceptions sustained.

The case was argued at the bar in January, 1915, before *Rugg*, C. J., *Loring*, *Braley*, *Crosby*, & *Pierce*, JJ., and afterwards was submitted on briefs to all the justices.

J. J. O'Hare, (*C. Toye* with him,) for the plaintiff.

R. W. Gloag, *pro se*.

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COMMISSIONER OF HEALTH *vs.* GUSTAV BUNZEL.

Suffolk. March 2, 1915. — April 15, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Municipal Corporations, Determination of population. *Census*. *Slaughter House*. *License*. *Evidence*, Presumptions and burden of proof.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, providing that "The mayor and aldermen, selectmen, or such other officers as they shall designate, or in a town having a population of more than five thousand, the board of health, if any, may annually issue licenses to carry on the business of slaughtering neat cattle, sheep or swine to applicants therefor," the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on December 14, 1914, by the Attorney General at the relation of the commissioner of health, and on April 10, 1915, amended into a bill in equity brought by the commissioner of health, alleging that the plaintiff was appointed commissioner of health under St. 1914, c. 792, that the defendant since September 30, 1914, had been carrying on the business of slaughtering neat cattle, sheep and swine in the town of Lexington, which had by the official census for the year 1910 a population of four thousand nine hundred and eighteen and therefore was not on September 14, 1914, or when the information (now the bill) was filed, a town having a population of more than five thousand, and that the defendant had been carrying on such business without any license from the selectmen of the town of Lexington as required by R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2. There was a prayer for an injunction.

The defendant in his answer alleged that the town of Lexington since at least April 1, 1914, had been a town having a population of more than five thousand and that on September 12, 1914, he had been granted a license by the board of health of Lexington to carry on the business of slaughtering neat cattle, sheep or swine within the limits of that town for the year ending April 30, 1915.

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The case was heard by *Pierce*, J. The only question raised was whether under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the selectmen or the board of health of the town of Lexington had the power to grant licenses to slaughter neat cattle, sheep and swine.

The plaintiff contended that the last official census of 1910, which took effect as of April 15, 1910, and which gave Lexington a population of four thousand nine hundred and eighteen, was conclusive evidence of the population of Lexington in 1914 and until the next official census was taken.

The defendant contended that the official census of 1910 was not conclusive evidence of the population in 1914, but that he might prove the actual population by any competent evidence. He then offered to prove by one Fitzgerald, the assistant postmaster of Lexington who had made an actual count, and by the official records kept by him as assistant postmaster showing in detail and by name the inhabitants of Lexington receiving mail through the Lexington post office, such official records having been made by him in accordance with the regulations of the post office department, that, at the time of the issuing of the defendant's license, the actual population of Lexington was five thousand six hundred and twenty-six, and that at least since April 1, 1914, the actual population of Lexington was over five thousand.

The single justice ruled that the evidence offered by the defendant was incompetent and immaterial and refused to admit it. He ordered that an injunction should issue as prayed for, and at the request of the defendant reported the case for determination by the full court. If the ruling was correct, an injunction was to issue as prayed for; if it was incorrect, the bill was to be dismissed with costs.

E. C. Stone, for the defendant.

J. W. Corcoran, Assistant Attorney General, for the plaintiff.

RUGG, C. J. It is provided by R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, that "The mayor and aldermen, selectmen, or such other officers as they shall designate, or in a town having a population of more than five thousand, the board of health, if any, may annually issue licenses to carry on the business of slaughtering neat cattle, sheep or swine." The defendant has

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carried on such business under the supposed protection of a license issued by the board of health of Lexington. The jurisdiction of that board is challenged on the ground that Lexington according to the last official census taken had a population of less than five thousand. The defendant offered to show by a count made by the assistant postmaster of Lexington that the population of the town was more than five thousand in 1914. The crucial point is whether the census is the sole test for determining population for the purposes of this statute, or whether population can be proved as any ordinary fact in a proceeding in court.

The statute is silent as to the method of determining population under these circumstances. A decennial census is taken by the Commonwealth in those years divisible by five and not by ten and by the United States in those years divisible by ten, so that there is an official census every five years. There is no machinery for an authoritative count at any other times. Formerly it was provided by R. L. c. 107, § 3, that a special enumeration of the inhabitants of cities and towns should be made by the chief of the bureau of statistics of labor at any time at the request of the mayor and aldermen of a city and of the selectmen of a town. But that was repealed by St. 1908, c. 90. That is a strong indication of a legislative purpose to depend wholly upon the official figures of the latest census.

It is important that there should be a certain and easily accessible method of determining where the power to appoint rests in cases like the present. There can be no such method unless an official census is resorted to. There well may be several towns where the population is near to five thousand. If the census is not the standard, then in case of a dispute between the selectmen and the board of health or of real doubt as to which board was vested with jurisdiction, there would be no way of settling the fact decisively so as to bind everybody. The law makes no provision for a count at the expense of the town. No appropriation could be made from the town treasury for such purpose. It cannot be presumed that the Legislature intended that a matter touching the public health so nearly as the preparation of a generally used food should be liable to be thrown into litigation in large communities in successive years. Any other means of determining population than by

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resort to authentic public records would open the door to great uncertainty and to the possibility or likelihood of mistake based on undue zeal, incompetence or even deceit.

Constitutional mandates compel the periodical taking of the census. Large sums of public moneys are spent to this end. The population statistics revealed by it bear the stamp of official regularity and accuracy. It is the almost universal source of reliable information as to numbers of inhabitants. A census is taken at such frequent intervals that no hardship can result from reliance upon it.

The inference is irresistible that in this matter the General Court intended that the population shown by the last State or national census must be used to determine which board has jurisdiction. Arguments as to statutory interpretation, which have been urged with force by the defendant and which might be of weight in close cases, are of slight moment in face of the overwhelming practical considerations to the contrary. Decisions upon somewhat kindred facts are to this effect. See *In re Sewer Assessment for Passaic*, 25 Vroom, 156; *Adams* v. *Elwood*, 176 N. Y. 106. No question is presented as to the census of summer residents under R. L. c. 100, § 13.

It follows that the board of health of Lexington had no jurisdiction in the premises and that the defendant ought to have made application to the selectmen. Injunction is to issue restraining the defendant from acting under the license issued by the board of health.

So ordered.

EXCELSIOR NEEDLE COMPANY *vs.* CITY COUNCIL OF SPRINGFIELD.

Hampden. March 11, 1915. — April 15, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & PIERCE, JJ.

Statute, Construction. *Springfield. Way*, Public. *Eminent Domain. Certiorari.*

The provision of St. 1904, c. 443, § 2, that "any city in the Commonwealth so far as the territory within its limits is concerned, may in the manner hereinafter set forth, take in fee by right of eminent domain the whole of any estate, part of which is actually required for the laying out, alteration or location by it of any public work, if the remnant left after taking such part would from its size or

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shape be unsuited for the erection of suitable and appropriate buildings, and if public convenience and necessity require such taking," confers no authority to take the fee of any land except in cases where there would be an unsuitable remnant left if only the part actually required for the public undertaking were taken; and accordingly the right to take land in fee is conditional upon there being such an unsuitable remnant which also is taken.

The city of Springfield under its charter, St. 1852, c. 94, § 14, as amended by St. 1872, c. 334, and St. 1873, c. 126, and under the general laws has no authority in laying out or widening a public way to take by eminent domain more than an easement except under the circumstances provided for in St. 1904, c. 443, § 2.

An attempt by the city of Springfield under St. 1904, c. 443, § 2, to take in fee by right of eminent domain only the part of a certain estate of land which it required for the widening of a public way, which is void as being beyond the powers of the city, cannot be construed as a taking of the public easement which the law allowed to be taken.

A delay of more than seven months, in filing a petition for a writ of certiorari to quash unlawful proceedings by the city council of a city for taking in fee certain land of the petitioner for the purpose of widening a public way, where such delay was occasioned by genuine efforts to adjust the whole matter by a compromise, and where the petition was filed immediately after the failure of such efforts and the right of the petitioner to contest the validity of the taking had been reserved expressly from the beginning and had been agreed to by the representatives of the city, was not considered a ground for refusing to issue the writ, although a delay of such duration ordinarily would have been decisive against the petitioner.

PETITION, filed on January 4 and amended on January 16, 1915, for a writ of certiorari to quash the proceedings of the city council of the city of Springfield relating to the alleged widening of Fulton Street between Cypress Street and Auburn Street in that city under an order of the city council approved by the mayor on May 26, 1914.

The case came on to be heard before *De Courcy*, J., who at the request of the parties reserved it upon the petition and answer and an agreed statement of facts for determination by the full court.

The portions of St. 1904, c. 443, referred to in the opinion other than § 2, of which all the material part there is quoted, are as follows:

"Section 22. A city may at any time, by proceedings under chapter forty-eight of the Revised Laws and acts in amendment thereof and in addition thereto or under any act giving it power to lay out, alter, relocate or widen ways, or in connection with proceedings under this act, take in fee any land in which it has previously taken or acquired an easement for a public highway, or may acquire such fee by gift or purchase."

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"Section 24. The powers conferred by this act shall be in addition to those conferred on public officers and boards by existing law, and shall apply in the case of any public work situate within the limits of any city, notwithstanding any limitations with regard to taking, laying out, widening, relocating or altering highways or other public works in the city of Boston or elsewhere."

C. E. Bell, for the petitioner.

C. H. Beckwith, for the respondent.

RUGG, C. J. The city of Springfield, by proceedings which culminated in July, 1914, under the authority of St. 1904, c. 443, undertook to widen an existing public way. Its appropriate boards of officers determined to take in fee by right of eminent domain the whole of several estates, parts of which actually were required for such widening and parts of which were remnants lying outside the limits of the widening. A part of the petitioner's estate was required for the widening, but no part of its estate lying outside the limits of the widening was taken or attempted to be taken. Nevertheless, the part of its estate lying within the limits of the widening, together with other estates lying partly within and partly without such limits, were taken in fee. It is contended that this was beyond the power conferred by the statute. Its governing provision in this respect is in § 2, in these words: "Any city in the Commonwealth so far as the territory within its limits is concerned, may . . . take in fee by right of eminent domain the whole of any estate, part of which is actually required for the laying out, alteration or location by it of any public work, if the remnant left after taking such part would from its size or shape be unsuited for the erection of suitable and appropriate buildings, and if public convenience and necessity require such taking."

These words rightly interpreted confer no authority to take the fee of any land except in cases where there is an unsuitable remnant remaining after the part actually required for the public undertaking is seized by eminent domain. The right to take in fee expressly by unequivocal phrase is made conditional upon there being such remnant and its being taken.

This is the reason of the statute as well. Ordinarily, as proved by the experience of our history in the laying out of public ways,

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the taking of the usual easement of travel is sufficient for public needs. A fee well might be deemed necessary only when the remnant was required, later to be sold, possibly with the usual incidents of ownership by the abutter of the fee in the street. The statute does not provide a general scheme for the taking of all land. It merely is engrafted upon existing authority to take land for public purposes. See § 24. The general procedure must conform to such pre-existing authority. St. 1904, c. 443, is supplementary to statutes conferring such power, when the peculiar facts arise to which alone it is applicable. The original statutory authority must be examined to ascertain the character and extent of the taking permitted for all other land except that to which St. 1904, c. 443, applies. The power possessed by the city of Springfield as to the widening of a public way was to take only the easement for travel, not the fee. See Sts. 1852, c. 94, § 14; 1872, c. 334, § 4; 1873, c. 126, § 6. Hence, when the city of Springfield needed only the land within the widening, that is the limit of its power to take. Its attempt to take the fee of the petitioner's land was in excess of its power. There is nothing which aids the respondent in § 22.

The terms of the statute by which the power to exercise eminent domain is conferred must be complied with. A loose attempt plainly in excess of the authority conferred cannot be construed as an exercise of the power actually existing when the words used in the instrument of taking are not fairly susceptible of being construed to mean that which in law was allowed. The attempt by the respondent to take the fee of the petitioner's land when it was empowered only to take an easement in that land cannot fairly be construed as a taking of an easement. *Lajoie* v. *Lowell*, 214 Mass. 8.

Under the peculiar circumstances of this case, we are of opinion that the writ ought to issue in the interests both of the city and the petitioner. Upon the estate of the petitioner within the limits of the widening are brick buildings in which a manufacturing business is conducted and in which, presumably, there is machinery more or less expensive and valuable. The title to buildings and machinery ought to be made clear by a legal taking. Although ordinarily delay like that in the case at bar before bringing the petition for certiorari would be decisive against the

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petitioner, yet it is agreed by the terms of the report that in substance the right of the petitioner to contest the validity of the taking was expressly reserved from the beginning and agreed to by the representatives of the city, and the delay was occasioned by genuine efforts to adjust the whole matter by a compromise, and immediately upon the failure of these efforts this petition was brought. Moreover, it is agreed that the city has done no work of highway construction within the limits of the widening, and that it has purchased in fee by deeds in due form the lands of all persons affected by the widening, with a single exception, aside from that of the petitioner. The title thus acquired hardly would be diminished or affected by the issuance of the writ. No sufficient reason appears for refusing the relief prayed for.

Writ to issue.

JAMES P. KLOTZ *vs.* PAN-AMERICAN MATCH COMPANY & others.

Suffolk. November 12, 1914. — April 24, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Corporation, Right of stockholder to inspect books and records, Foreign, By-laws. *Mandamus*.

The common law right of a stockholder in a corporation to inspect the books and records of the corporation at seasonable times and for proper purposes is well established; but the right is a qualified and not an absolute one, and the issuing of a writ of mandamus, which is the appropriate remedy to enforce the right in this Commonwealth, is discretionary.

The statutory right to inspect the books and records of corporations given to stockholders by St. 1903, c. 437, § 30, here was assumed to be applicable only to domestic corporations; the remedy of a stockholder in a foreign corporation having its usual place of business in this Commonwealth being a writ of mandamus to enforce his common law right of inspection.

A by-law of a foreign corporation, whose place of business is in this Commonwealth, whose officers reside here and whose books and records are kept here, providing that "the directors shall determine from time to time whether, and, if allowed, when and under what conditions and regulations the accounts and books of the corporation (except such as may by statute be specifically open to inspection) or any of them shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted and limited accordingly," where no provision of the general law of the State of incorporation or of the charter of the corporation authorizes such a by-law, is invalid against a

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stockholder seeking by a petition for a writ of mandamus in this Commonwealth to enforce his common law right of inspection.

In holding invalid a by-law of a corporation which unreasonably obstructed a stockholder's common law right to inspect the books and records of the corporation, it was *said*, that undoubtedly a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders.

PETITION, filed on July 2, 1914, by the holder of one hundred and seventy-six shares of the common stock of the Pan-American Match Company, a corporation organized under the laws of the State of Delaware and having its usual place of business and its principal office and manufacturing plant at Worcester in this Commonwealth, against that corporation and three individual respondents, Sterling, Buxton and Tatman, respectively its president, treasurer and secretary, for a writ of mandamus commanding the respondents to produce for examination and permit the petitioner and his agents and attorneys to examine and take copies of and abstracts from certain books, records and papers described in eighteen paragraphs of the petition, as printed below, subject to such regulations as the court might prescribe.

The eighteen paragraphs of the petition, describing the books, papers and records of which an inspection with permission to make copies was desired, were as follows:

"1. The minutes of organization and of all proceedings of the board of directors and of the stockholders of the Pan-American Match Company since the incorporation of the company, and including the by-laws and corporate charter.

"2. The stock ledger, showing the amount and kind of capital stock issued, and to whom issued, and the consideration paid therefor.

"3. The stock certificate books, including the stub record of all certificates issued.

"4. All contracts of subscription and other instruments in writing, showing the relation between the respective stockholders of the company.

"5. All contracts made in the name or in behalf of the Pan-American Match Company, under which it purchased, or agreed to purchase, the property and assets of the United States Match Company, and of the Colonial Match Company, or either of them.

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"6. The agreement containing the terms of the purchase of any other assets of the Pan-American Match Company.

"7. Contracts setting forth the terms of the merger or consolidation of the Pan-American Match Company with the United States Match Company of Indiana.

"8. Ledger of the Pan-American Match Company containing complete record of assets and liabilities.

"9. The books, ledger, and other corporate records of the United States Match Company of Indiana.

"10. The books, ledger, and other corporate records of the Colonial Match Company, provided said company has consolidated or entered into an agreement for consolidation with the Pan-American Match Company.

"11. All instruments, papers, and other records of the Pan-American Match Company referring or in any way relating to its purchase from Henry Stair and W. W. Sterling, or either of them, of the match machinery formerly owned by the Indiana Match Corporation.

"12. The contract of purchase wherein the Colonial Match Company agreed to buy eighteen or more match machines from the United States Match Company, and the records showing amounts paid under said contract.

"13. Any other contracts for the sale of match machinery to other persons, corporations, and subsidiary companies.

"14. All papers, records, and other instruments in writing showing, referring, or relating to any commissions on the sale of stock paid to the respondents Charles T. Tatman, W. W. Sterling, and A. L. D. Buxton, and to one A. A. Buxton, or to either of said gentlemen, or relating to any other commissions to be paid for the sale of the stock of said Pan-American Match Company.

"15. The contract containing the terms of purchase of the manufacturing plant and property of the Pan-American Match Company.

"16. All papers, books, and writings of the Star Match Company, and particularly such as relate or refer to the patent rights in the 'Lundgren or Sterling Automatic Match Machine.'

"17. A statement of the auditor or accountant showing complete inventory, and of all expenditures and receipts to date.

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"18. Any and all other books, papers, and records referring or in any way relating to the affairs of the company."

The case was referred to an auditor, and later was heard by *Braley*, J., upon the original report and a supplemental report of the auditor and also the oral testimony of the respondent Buxton and of one Longacher, who was the superintendent of the respondent corporation in charge of its factory. The justice found upon all the evidence that the facts were as stated by the auditor except that a certain payment was not made in cash but was assumed as a liability of the respondent corporation. The justice stated that so far as the issuance of the writ was discretionary he should exercise his discretion in favor of the petitioner. At the request of the respondents the justice reported the case upon his findings of fact for determination by the full court upon all questions of law. If as matter of law the petitioner was entitled to relief, the writ was to issue; otherwise, the petition was to be dismissed.

The case was submitted on briefs.

C. T. Tatman, for the respondents.

E. Rheinfrank & J. S. Graham, for the petitioner.

De Courcy, J. The common law right of a stockholder to inspect the books of a corporation at seasonable times and for proper purposes is well established. See cases cited in notes, 45 L. R. A. 446; 20 L. R. A. (N. S.) 185; Ann. Cas. 1913 E 173. The right is based on the stockholder's interest in the assets and business of the corporation. It was said by Knowlton, C. J., in *Varney* v. *Baker*, 194 Mass. 239, 240: "The stockholders of a corporation are the equitable owners of its assets, and the officers act in a fiduciary relation as agents of the corporation and of the stockholders. They should be ready to account to the stockholders for their doings at all reasonable times, and the stockholders have a right to inspect their records and accounts, and to ascertain whether they are faithful, honest and intelligent in the performance of their duties."

This common law right, however, is a qualified and not an absolute one; and further, the remedy in this Commonwealth is by mandamus, which is a discretionary writ. A stockholder ordinarily will be permitted to examine the books and accounts when he is seeking information as to the condition of the corporation in

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good faith and for the purpose of protecting his own rights or advancing the interests of the corporation. But the rights of the corporation itself, especially in the protection of trade secrets, and the interests of the other stockholders, will not be disregarded by the court in acting upon the application. *Varney* v. *Baker, ubi supra. Butler* v. *Martin,* 220 Mass. 224.

The statutory right of inspection, given to stockholders by St. 1903, c. 437, § 30, need not be considered in the case at bar, as presumably it is applicable only to domestic corporations. See *Powelson* v. *Tennessee Eastern Electric Co.* 220 Mass. 380.

The respondent company is a foreign corporation, incorporated under the laws of Delaware. Its manufacturing plant and its principal office and books are in the city of Worcester in this Commonwealth, and the respondent officers reside there. That our courts will enforce the common law right of a stockholder to examine the books of a foreign corporation in these circumstances was settled in *Andrews* v. *Mines Corp. Ltd.* 205 Mass. 121. As was said in that case, in order to enforce this right of inspection "the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another."

As justification for their refusal to permit an inspection the respondents rely on Article 42 of the by-laws of the corporation, and the action of the directors thereunder. The by-law is as follows: "The directors shall determine from time to time whether, and, if allowed, when and under what conditions and regulations the accounts and books of the corporation (except such as may by statute be specifically open to inspection) or any of them shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted and limited accordingly." The resolution of the directors, after the preliminary recitals, was: "Be it resolved, that action upon the demand of James P. Klotz be deferred until such time as the directors in their discretion see fit to grant the required inspection and information in whole or in part."

The apparent purpose and practical effect of this by-law is to defeat the common law right of a stockholder to inspect the books of the corporation in which he is financially interested.

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The determination of the exercise and extent of that right is taken from the court and delegated to the discretion of the very men whose conduct in carrying on the business the petitioner properly desires to investigate. No provision of the general law of Delaware or of the corporation's charter authorizing the corporation to bind the stockholders by such a by-law has been shown. And, as no evidence of the common law of that State applicable to the case was introduced at the trial, we must presume that it is the same as that of Massachusetts. *Lemieux* v. *Boston & Maine Railroad*, 219 Mass. 399.

The power of a corporation to prescribe rules for its government and to regulate the conduct and define the duties of its members is not an unlimited one. Among the recognized conditions to the validity of such internal regulations, one is that such by-laws must be reasonable, and another that they must not contravene the established principles of right guaranteed by the common law. Familiar instances of by-laws held to be invalid, especially in business corporations, where property rights are involved, are those attempting to impair the right of stockholders to sue in the courts; to absolve shareholders from their statutory liability to creditors; or to impose upon shareholders a liability to pay the corporate debts when not within the powers conferred on the corporation. *Nute* v. *Hamilton Mutual Ins. Co.* 6 Gray, 174. *Trustees of Free Schools in Andover* v. *Flint*, 13 Met. 539. *Traders & Mechanics' Ins. Co.* v. *Brown*, 142 Mass. 403. *Greene* v. *Mayor of Fitchburg*, 219 Mass. 121. 10 Cyc. 356, 357, and cases cited. Undoubtedly a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders. But it cannot make a by-law which denies or unreasonably obstructs their common law right. *Hodgens* v. *United Copper Co.* 67 Atl. Rep. (N. J.) 756. *State* v. *Citizens' Bank*, 51 La. Ann. 426. *State* v. *Jessup & Moore Paper Co.* 1 Boyce (Del.) 379.

The respondent corporation has accepted the provisions of our statutes enabling it to do business in Massachusetts. In fact its property and officers, its books and their custodians are within this State; and it carries on its business here. Our courts have jurisdiction of the parties and practical means of enforcing a decree for inspection of the corporate books, thereby doing substantial justice to all parties interested. The by-law relied upon

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is invalid in our opinion, and cannot deprive the petitioner of his legal rights, nor this court of the power to enforce them. *Andrews* v. *Mines Corp. Ltd. ubi supra.* See *Richardson* v. *Clinton Wall Trunk Manuf. Co.* 181 Mass. 580; *Harding* v. *American Glucose Co.* 182 Ill. 551, 633; *Ernst* v. *Rutherford & Boiling Springs Gas Co.* 38 N. Y. (App. Div.) 388.

It remains to determine the scope of the examination to which the petitioner is entitled. He seeks to examine all the books, records and papers specified in the petition under eighteen heads, and to take copies and abstracts therefrom. Before considering the requests in detail some of the material facts found by the auditor should be stated. There is outstanding $530,800 of the common stock and $215,975 of the preferred stock of the respondent company. It is engaged in the business of manufacturing and selling matches and match machinery, and acquired its property by purchase from the Colonial Match Company, the United States Match Company, the Pan-American Match Company of Ohio, and the Star Match Company, — paying in stock and money. At the time when the plant of the Colonial Match Company was bought, the respondents Sterling and Buxton, and the latter's brother, A. A. Buxton, constituted a majority of the board of directors of the Colonial Company; Sterling was one of the directors of the respondent company; and the other six directors of the respondent company were closely associated, in one way or another, with Sterling and later with Buxton. The petitioner owns one hundred and seventy-six shares of the common stock of the respondent company, was formerly interested in the Pan-American Match Company of Ohio, and is thoroughly familiar with the manufacturing of matches. Before bringing this petition he sought employment from the respondents and attempted to sell them his stock. The auditor found that the petitioner is acting in good faith in seeking the information he demands. The report of the single justice states that in so far as the issuance of the writ is discretionary, he would exercise his discretion in favor of the petitioner.

We are of opinion that the petitioner is entitled to relief as follows: He may inspect and make copies of or extracts from those books and papers specified in the fifth paragraph of his petition, numbered 1, 2 and 3, embracing the records of the corporation

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and of the directors, the stock certificate books and stock ledger; also the ledger of the respondent company (No. 8); the statement of the auditor or accountant (No. 17); and the contracts for the purchase of the property and assets of the Colonial Match Company (included in No. 5). The other requests are denied. As to these it may be said generally that those numbered 4, 6, 13, 14 and 18 are too broad and indefinite; others, such as 9, 10, 12 and 16, call for the books and papers of other corporations not shown to be in the possession of the respondents; it does not appear that there is any such contract as that suggested in No. 15; and the remaining ones are not material so far as the record shows. The time and manner of inspection will be settled by a single justice.

Writ to issue.

COMMONWEALTH *vs.* FRED J. DERRY.

Essex. March 1, 1915. — May 19, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Burning Insured Property. Accessory. Evidence, Competency.

At the trial of an indictment under R. L. c. 215, § 2, for being an accessory before the fact to the felony of burning the defendant's factory to defraud certain insurance companies in violation of R. L. c. 208, § 10, it appeared that the defendant's factory was equipped with a sprinkler system, and that after the fire it was discovered that sixty-three out of the two hundred and fourteen sprinkler heads of the system had been plugged with corks of the size ordinarily used in half pint bottles. It could have been found that the defendant had sufficient mechanical knowledge and skill to remove the heads, insert the corks and then restore the heads to their normal position, that he had ample although not exclusive opportunity to plug the heads, and that at the time of the fire the defendant was disheartened and was not averse to making a fire sale. There also was evidence that the defendant had a brother who was employed in the defendant's factory at the time of the fire and had been employed there for a number of years, and that at about six o'clock on the evening before the fire occurred this brother locked up the factory for the night. There was no other evidence to show the connection of this brother with the defendant's business or the intimacy of his relations to the defendant or his family. The presiding judge against the defendant's exception admitted evidence that a month or two before the fire the defendant's brother called at a certain store and asked the proprietor "if he could let him have a number of dozen of cork stopples, at the same time holding out a cork which he held in

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his hand, said cork being the type ordinarily used in one half pint bottles," but that the proprietor had no corks of that size, and also evidence that in the month before the fire the defendant's brother bought at another store perhaps a dozen or two or three or four dozen "small corks for half pint or pint bottles." *Held*, that the evidence of the actual purchase of the corks by the defendant's brother was admissible as tending to show circumstantially that the defendant had the means and the opportunity of procuring without direct purchase corks of the kind used to stop the sprinklers; but that the admission of the evidence of the previous inquiry for such corks by the defendant's brother was error that required the sustaining of the defendant's exception, there having been no evidence to show that the defendant's brother knew the purpose for which the corks were to be used or that he in any way participated in their use or in setting the fire.

PIERCE, J. The defendant was indicted in two counts charging him in the first count under R. L. c. 208, § 10, with burning his box factory in Danvers on November 22, 1911, to defraud certain insurance companies, and in the second count under R. L. c. 215, § 2, with being an accessory before the fact to such burning by a person to the jurors unknown. The defendant was acquitted as principal and was found guilty as accessory before the fact.* The factory was equipped with a sprinkler system which might be operated in two ways, one by filling it with air which would be compressed by the pressure of the water behind it, and one by filling it with water.

After the fire it was discovered that of the two hundred and fourteen sprinkler heads of the system with which the factory was equipped sixty-three had been plugged with corks of the size ordinarily used in half pint bottles. The fire protective efficiency of the system manifestly was impaired in the proportion that the plugged heads bore to the whole number of heads. The fact of the plugging proved indubitably some one's purpose to destroy, at least in part, the shield which the system presented to the ravages of a possible fire.

There was testimony upon which the jury properly might have found that the defendant had sufficient mechanical knowledge and skill to remove the heads, insert the corks, and then restore the heads to their normal position. The testimony also would have justified a finding that of those connected with the defendant's business only two others, — Harris and Waugh, — understood the system and could have plugged the heads.

* The defendant alleged exceptions, which were allowed by *Keating*, J., before whom he was tried.

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There was testimony upon which the jury might have found that the defendant had ample although not exclusive opportunity to plug the heads.

While it properly could not have been found that the property was over insured, it might have been found that for some good or bad reasons, or for no reason at all, the defendant was disheartened and not averse to making a fire sale. This fact, if found, established a motive for the defendant's alleged acts.

The Commonwealth strongly argues that the defendant and his brother, Frank Derry, had entered into a conspiracy to burn the defendant's box factory, and that the acts of the defendant and the acts of Frank Derry, in the purchase and attempts to purchase corks, were "directed toward a common object, namely, the object of making preparations for the fire and setting the fire." The short answer to this contention is that the defendant and Frank Derry were not, and so far as appears are not, under indictment as conspirators.

If the evidence had shown a conspiracy to burn, it is doubtful whether an indictment would lie after the commission in fact of the felony, and especially after the acquittal of one of the two alleged conspirators. To be an accessory before the fact the person incited, procured or commanded must become a principal in the commission of the contemplated crime as a result of the defendant's acts. As to Frank Derry, the only evidence offered by the government to show his connection with the defendant's business, or the intimacy of his relations to the defendant or to his family, was that he was a brother employed in his brother's factory at the time of the fire and for a number of years preceding; that at about six o'clock in the evening of November 21, 1911, he locked up the factory for the night, the fire occurring at 1.30 A. M. on November 22; and that upon occasions previous to the fire he had used a key in opening and closing the door of the storehouse. Without other testimony the government, against the objection of the defendant, was permitted to show that Frank Derry, in September or October, 1911, called at the store of one Ralph Wheelwright and asked Wheelwright "if he could let him have a number of dozen of cork stopples, at the same time holding out a cork which he held in his hand, said cork being the type ordinarily used in one half pint bottles,"

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but that Wheelwright had no corks of the required size on hand. This testimony, which was given by one Collins, a clerk in the store of Wheelwright and by Wheelwright himself, in the absence of any evidence tending to show a common purpose or that Frank Derry was acting at the request of the defendant, was inadmissible.

Testimony of one Blodgett also was admitted, against the objection of the defendant, that somewhere around October, 1911, Frank Derry came to the store of one Ross and inquired for cork stopples; that the clerk in the store, Blodgett, sold him, Derry, "some cork stopples, the number and size of which he [the clerk] could not recall; that it might have been a dozen or two; that he [the clerk] could not say whether it was three or four dozen;" and that "they were small corks for half pint or pint bottles." The jury would have been justified in the belief that the corks used to plug the sprinklers were of the kind sold to Frank Derry, and that they naturally were kept in a place accessible to the defendant. The evidence, therefore, was admissible as tending circumstantially to show that the defendant had the means and the opportunity of procuring corks of the kind used without direct purchase. Frank Derry testified that he did not have any conversation with Wheelwright about cork stopples, and that he did not buy any from Blodgett (the clerk) at the Ross store.

At the close of all the evidence the defendant moved for the exclusion of the testimony as to the acts of Frank Derry "on the ground that no such connection had been shown between Frank Derry and the defendant, or evidence of any such connection offered or introduced as to make the testimony . . . admissible." The judge refused so to do, and the defendant excepted.

No evidence had been introduced tending to show directly or inferentially that as between the defendant and his brother there existed or had existed any business connection or interest other than such as naturally appertains to the relationship of employer and employee. There was no evidence whatsoever showing the presence or absence of any unusual bond of sympathy such as sometimes marks near relationship. Assuming that Frank Derry purchased the corks, and further assuming that they were used to plug the sprinkler heads by the defendant or by some one at his request, there is no evidence that Frank knew the purpose

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to which they were to be put or in any way participated in their use or in the setting of the fire.

The testimony of Collins and Wheelwright should have been stricken out, and the exception to the refusal so to do must be sustained.

So ordered.

The case was argued at the bar in March, 1915, before *Rugg*, C. J., *Braley*, *De Courcy*, *Pierce*, & *Carroll*, JJ., and afterwards was submitted on briefs to all the justices.

J. P. Sweeney, (*A. P. White & G. C. Richards* with him,) for the defendant.

H. C. Attwill, Attorney General, (*J. W. Corcoran*, Assistant Attorney General with him,) for the Commonwealth.

ALBERT E. HASKELL *vs.* JAMES P. CUNNINGHAM & another.
HIRAM H. LOGAN & another *vs.* SAME.
CHARLES A. ADAMS, INCORPORATED, *vs.* GEORGE L. WEISS & another.

Suffolk. March 3, 1915. — May 19, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Poor Debtor. Evidence, Of judicial record, *De bene. Judgment. Practice, Civil*, Exceptions, Conduct of trial. *Words*, "Commencement."

Where a debtor after his arrest upon an execution and a certificate has entered into a recognizance in a police court under R. L. c. 168, § 30, to appear before the court and abide its final order, if the judge of another police court, before whom the debtor appears for examination on his application to that court to take the oath for the relief of poor debtors, orders his discharge, the debtor has performed the obligation of his recognizance, and, if the order of the judge was erroneous in law, this constitutes no breach of the recognizance on the part of the debtor.

Where a debtor after his arrest upon an execution and a certificate has entered into a recognizance in a police court to appear before the court and abide its final order, and thereafter makes application to another police court to take the oath for the relief of poor debtors, this properly is regarded as "the commencement" of a proceeding and it is the duty of the execution creditor under R. L. c. 168, § 74, to pay an entry fee of $3, and, if he refuses to do this, it is right for the judge of the court to refuse to allow the examination to proceed and to order the debtor discharged.

The record of a police court is conclusive and cannot be controlled by oral evidence.

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Where at a trial evidence which was objected to was admitted *de bene* by the presiding judge, and an exception was taken to its admission, this exception to the provisional admission of the evidence cannot be sustained unless the excepting party afterwards asked to have the evidence stricken out.

THREE ACTIONS OF CONTRACT, each against the principal and a surety, for an alleged breach of the recognizance of a poor debtor. Writs dated in the first case on March 20, 1913, and in the second and third cases on April 10, 1913.

In the Superior Court the cases were tried together before *Fox*, J., without a jury. The evidence and the course of the trial are described in the opinion. At the close of the evidence the plaintiffs asked the judge to make the following rulings:

"1. On the evidence and the law the plaintiff is entitled to recover.

"2. If the defendant Cunningham after arrest entered into the usual poor debtor recognizance and thereafter made application to take the poor debtor's oath and notice thereof was given to the plaintiff, the burden of paying fees for said application for notice is upon the defendant and not upon the plaintiff.

"3. If after recognizing with surety application to take the poor debtor's oath was made by the defendant Cunningham and notice thereof issued to the plaintiff and the said Cunningham or no one in his behalf paid to the clerk fees for said application and notice thereof and the court discharged said Cunningham without examination because the plaintiff, after request, made default in payment of said fees, then said Cunningham had not complied with the terms of the poor debtor recognizance and the surety on said recognizance is liable.

"4. If the fees for application and notice to take the poor debtor's oath made by said Cunningham were not paid, then the notice of said Cunningham's application to take the oath was improperly issued and the court had no jurisdiction to order the discharge of the said Cunningham.

"5. If said Cunningham availed himself of the order of discharge made by the trial judge in his application to take the poor debtor's oath and consented thereto, said Cunningham did not in all respects then comply with the terms and conditions of the poor debtor recognizance."

The judge refused to make any of these rulings and found for

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the defendants. The plaintiffs alleged exceptions, it being agreed that the amount of damages for which the defendants in each case were liable, if liable at all, was the amount of the execution in that case.

F. W. Mowatt, for the plaintiffs.

E. McAnally, for the defendants.

CARROLL, J. These three cases were heard together by a judge of the Superior Court without a jury.

The debtors were arrested under R. L. c. 168, upon certificates and executions issuing from courts in Essex County other than the Police Court of Lawrence, before which court each of the debtors was taken and there entered into a recognizance under R. L. c. 168, § 30, and later made application to that court to take the oath for the relief of poor debtors.

The record of the poor debtor proceedings in the Police Court of Lawrence was in evidence and showed "the creditor by its attorney requested the debtor to be sworn and the examination to proceed on the debtor's application. The clerk then stated that the entry fee of $3 for the notice had not been paid and the court requested the creditor to pay the same, and on the creditor's refusing to pay said fee, the court refused to allow the examination to proceed and ordered the debtor discharged," the record being the same in each of the three cases, with the exception of the names of the parties. Even if there was error in demanding the fee of $3 from the creditor, and upon his refusal to pay discharging the debtor, there was no default in the recognizance. The debtor contracted to appear before the court and abide its final order. That he has done. "It is immaterial whether or not the order proceeded from an erroneous view of the law on the part of the magistrate." *Mann* v. *Cook*, 195 Mass. 440.

The order of the judge, in requiring the creditor to pay the fee established by law before examining the debtor, was in accordance with the statute. The obligation to pay the fee of $3 was upon the creditor plaintiff and not upon the debtor, and, the creditor refusing to pay it, the debtor was discharged properly. R. L. c. 168, § 74, provides, "Upon the commencement of any proceedings" relative to male debtors in police, district or municipal courts, an entry fee of $3 shall be paid, to be in payment for hearing applications for examination, continuances and the

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issuing of all notices and certificates required in such proceedings. When the proceedings are not before a police, district or municipal court, but are before some other magistrate authorized to act, his fees are governed by R. L. c. 168, § 75.

Before 1891 the fees were the same in poor debtor cases whether the proceedings were before police, district and municipal courts or before other tribunals, and the plaintiff or creditor causing the arrest was obliged to pay all of these fees in advance. Pub. Sts. c. 162, § 68. In 1891 the law was changed in so far as it related to police, district and municipal courts. It was changed by doing away with the separate items as fees in these courts and directing that in such courts one fee of $3 should be paid. St. 1891, c. 313, now R. L. c. 168, § 74. The Legislature in making this change in the amount of the fee which was to be paid, did not intend to relieve the creditor of the duty of payment and this obligation remained where it was before the statute of 1891; that is to say, upon the creditor, and not upon the debtor, the only change effected by the statute of 1891 being a change in the amount of the fee to be paid, and making no change in the party upon whom rested the obligation of payment.

This is further shown by the concluding paragraph of R. L. c. 168, § 75, "If the oath is not administered, such fees shall be allowed as part of the service of the writ or execution," plainly showing that the fees for the examination were not to be paid by the debtor, and in R. L. c. 168, § 42, if the creditor makes default in the payment of fees, the debtor shall be discharged; "but if, after the oath has once been refused, the defendant or debtor again applies for the benefit thereof, the fees for such subsequent application or examination thereon shall be paid by him."

In the section of the statute relating to female poor debtors, R. L. c. 168, § 14, the petitioner is required to pay the fee of $3 and the judgment debtor is required to pay this amount if she is found to have property.

It is manifest, in the matter of the statutory regulation of proceedings against poor debtors, that the creditor would not be entitled to recover these fees under the poor debtor proceedings as a part of the costs against the debtor, if the oath for his relief was refused him, unless the creditor was by law compelled to pay these fees in advance. The fact that the creditor is entitled to recover

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the sum as a part of his costs, shows that the obligation of payment is upon him, and it is also evident that the Legislature did not intend in the matter of fees, that one rule should be established for female judgment debtors and another rule for male debtors. In all cases the fees are to be paid by the creditor, in advance.

If the debtor was brought before the same court from which certificates of arrest were issued, there probably would be no question that the creditor, in making the application, would have to pay the fee. The difficulty arises in this case because the debtors recognized and appeared in another tribunal, and, while it may be contended that the fee which was paid when the arrest of the debtors was authorized covered all subsequent proceedings in that court or in any other court within the county in which the debtor was arrested, *Dalton-Ingersoll Co.* v. *Hubbard*, 174 Mass. 307, we think in a case like this, where the debtor is brought before a court other than the one to which application was made for his arrest, it is in the language of R. L. c. 168, § 74, "the commencement" of a proceeding. The fee must be paid in advance and the responsibility is upon the creditor to pay to that court where the debtor recognizes and where he is to be examined. The judge of the Police Court of Lawrence, therefore, properly demanded of the creditor the fee required by law and upon his failure to pay, the debtor was entitled to his discharge. R. L. c. 168, § 42.

The clerk of the Police Court of Lawrence was permitted to testify in contradiction of the court's records. This evidence was not admissible. A judicial record is conclusive and cannot be controlled by parol evidence. "Its allegations and facts are not the subject of contradiction. . . . No averment can be made against them, nor can they be varied by parol." *Sayles* v. *Briggs*, 4 Met. 421, 423. *Warburton* v. *Gourse*, 193 Mass. 203. *Tufts* v. *Hancox*, 171 Mass. 148. *Bent* v. *Stone*, 184 Mass. 92. *Niles* v. *Silverman*, 216 Mass. 242. But this evidence was admitted *de bene*, and therefore there was no error. When evidence is admitted *de bene esse*, it is admitted only provisionally, and the objecting party, to avail himself of his exception, must ask to have the evidence stricken out. *Doon* v. *Felton*, 203 Mass. 267.

Exceptions overruled.

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FRANK FLOCCHER'S CASE.

Suffolk. March 3, 1915. — May 19, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Workmen's Compensation Act. Words, "Incapable of use."

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11, as amended by St. 1914, c. 708, § 6, by which additional compensation is to be awarded in case a "hand, foot, thumb, finger, toe or phalange is not lost but so injured as to be permanently incapable of use," where the elbow of the injured workman's right arm is gone permanently, the right hand is paralyzed, leaving only a slight power of motion in the thumb and first finger and there is "interference of the circulation, so that he has a hand that goes to sleep," and where by a suggested operation the arm could be bent so as to remain stiff at a right angle instead of hanging straight at his side "and he would be able to use it for various purposes which he could not do with it by his side," but upon the testimony it can be found that it is pure speculation whether, if the workman should submit to such an operation, the hand ever would become in any normal sense a useful member, a finding is warranted that the workman's right hand is "permanently incapable of use."

PIERCE, J. This is a claim under the workmen's compensation act. The right of the claimant to receive a payment of $10 a week for total incapacity is admitted, and such payments have been made from week to week as they became due.

The insurer, however, does question that part of the decision which allows the claimant specific compensation for fifty weeks at $10 a week, for permanent loss of the right arm (hand) under the provision of the workmen's compensation act, St. 1911, c. 751, Part II, § 11, as amended by St. 1914, c. 708, § 6. This amendment provides that the additional amounts to be paid "in case of the loss of a hand, foot, thumb, finger, toe or phalange, shall also be paid for the number of weeks above specified in case the injury is such that the hand, foot, thumb, finger, toe, or phalange is not lost but so injured as to be permanently incapable of use."

This statute, so far as quoted, puts in implicit form the law as to the permanency of the injury assumed in *Meley's Case,* 219 Mass. 136, to be the reasonable construction of the words "incapable of use" as set down in St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 445. The words "incapable of use"

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should receive a construction which, while fairly within their interpretation, is not narrow and technical, nor on the other hand so free and liberal as to give a right which the words themselves do not fairly import.

In the case at bar, for practical purposes, the ability to use the hand to the extent of a small amount of motion in the thumb and first finger, with the middle, ring and little finger paralyzed and with an interference of the circulation to such a degree that the hand goes to sleep, is negligible. The use approaches the infinitely small, and must be disregarded if we are to prevent the technical impairment of a humane provision of law. *Meley's Case, supra.*

But it is said that an operation will aid the improvement of the thumb and forefinger by making them more accessible and thereby leading to their being used more. If the claimant is not to be subjected to unusual risk and danger arising from the anæsthetic to be employed or from the nature of the proposed operation, it is the claimant's duty to submit if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain. *Tutton* v. *Owners of Steamship Majestic*, [1909] 2 K. B. 54. *O'Neill* v. *Brown & Co. Ltd.* [1913] Sess. Cas. 653.

Does it appear that the result of an operation upon the claimant will be a real and substantial gain? At present the elbow of the claimant's right arm is permanently gone, the right hand, save "a small amount of motion in the thumb and first finger," is paralyzed, and there is "interference of the circulation, so that he has a hand that goes to sleep." The operation proposed is to place the arm, under ether, in a right angle and then have the arm set. This leaves the elbow permanently impaired, but gives the arm a wider field of motion than when hanging at the side.

Dr. Donoghue said: "It will be a long while after the operation before he will acquire the use of his arm. You could not make any prognosis of it." "With his arm at a right angle, he would be able to do certain things. . . . He could not do much at the end of a long stiff arm. . . . An operation would give him a stiff arm at a right angle, but he could button his clothes, or get his hand to his mouth, and he would be able to use it for various purposes which he could not do with it by his side. . . . He would have a more useful arm bent in a right angle than he

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has at present, and one that he could use to do some work with. . . . It is simply a question of impairment. It would be less impaired in a right angle than where it is. It would be pretty close to being permanently incapacitated for use, even after this operation."

Upon the testimony it could be found that it was pure speculation whether the hand ever would become in any normal sense a useful member.

No attempt was made to fix the limit of time within which the partial relief of the hand's total incapacity would become manifest save that no prognosis could be made.

It well may be asserted that it would be unreasonable to put the claimant at least to the discomfort attending an operation the result of which would be the probability of a shoulder "stretched out" and of muscles "used up," and in addition doubt as to the time within which some uncertain and indeterminate degree of benefit reasonably might be expected.

The finding that the right hand is "permanently incapable of use" was warranted and no error of law appears. *Herrick's Case*, 217 Mass. 111. *Meley's Case*, 219 Mass. 136. The decree of the Superior Court must be affirmed.

So ordered.

A. L. Richards, for the insurer.
H. D. Crowley, for the employee.

W. S. QUINBY COMPANY *vs.* HENRY E. ESTEY.

Suffolk. March 4, 1915. — May 19, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Agency, Existence of relation.

Where a wholesale dealer in tea and coffee hired from a general teamster a horse, wagon and driver for the sum of $29 a week to deliver merchandise for the dealer, and "had nothing to do with the care of the horse, wagon or harness or man, except to give the driver orders as to where to go for goods, or where to deliver goods," and had no right to regulate the hours of the driver or his manner of handling goods and, when he thought the driver ought to do more work, had

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to take the matter up with the general teamster from whom he hired him, and where this driver carelessly lost certain chests of tea belonging to the dealer while carrying them from the wharf of a steamship company to the dealer's warehouse, in an action by the dealer against the general teamster for the loss of the tea, it can be found that the driver whose negligence caused the loss was the defendant's servant and was not the servant of the plaintiff.

CARROLL, J. The plaintiff, who was a wholesale dealer in tea and coffee, hired from the defendant, who was a teamster, a horse, wagon and driver for the sum of $29 a week to deliver the merchandise of the plaintiff. The driver, Day, was paid by the defendant, and, while he was carrying seventeen chests of tea belonging to the plaintiff from the Metropolitan Steamship Company's wharf to the warehouse of the plaintiff, they were lost. This action is to recover their value. The jury found specifically that the tea was lost through Day's carelessness and that he was not the servant or employee of the plaintiff. The case is before us upon the defendant's exceptions to the refusal of the presiding judge * of requests of the defendant for rulings that, while Day was in the general employ of the defendant, he was so far under the direction and control of the plaintiff that he became its servant and ceased to be the servant of the defendant.

When a servant or agent in the general employ of one person is sent to work for another, he does not become the servant of the one to whom he is sent merely because the latter directs what work is to be done, or in what way it is to be done. The original master remains liable and the employee remains his agent, unless the authority to direct and control the servant in all the details of the transaction is surrendered to some other person, so that the business in which the servant is engaged is no longer the business of his general employer, but is in all respects the business of the person to whom he is sent. If the servant remains subject to the general orders of the man who hires and pays him he is still his servant, although specific directions may be given him by another person from time to time as to the details of the work and the manner of doing it. *Tornroos* v. *R. H. White Co.* 220 Mass. 336. *Hunt* v. *New York, New Haven, and Hartford Railroad,* 212 Mass. 102, 107. *Hussey* v. *Franey,* 205 Mass. 413.

* *Hitchcock,* J., who, after the jury had returned their answers to the specific questions, ordered a verdict for the plaintiff in the sum of $460.19.

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Shepard v. *Jacobs*, 204 Mass. 110. *Oulighan* v. *Butler*, 189 Mass. 287. *Delory* v. *Blodgett*, 185 Mass. 126. *Driscoll* v. *Towle*, 181 Mass. 416.

It was for the jury to say what the contract of the parties was and what conclusions should be drawn from the evidence concerning the relations of Day to the plaintiff and to the defendant. *Cain* v. *Hugh Nawn Contracting Co.* 202 Mass. 237. A witness of the plaintiff testified that the plaintiff "had nothing to do with the care of the horse, wagon or harness or man, except to give the driver orders as to where to go for goods, or where to deliver goods. . . . The plaintiff had no right to regulate hours of the driver, . . . or to dictate to the driver if he did not suit the plaintiff in handling freight. . . . If the plaintiff thought the driver ought to do more work, the plaintiff could not dictate to the driver, but had to take the matter up with the defendant." There was also evidence that "Day never trucked anybody else['s] goods but the plaintiff's, except when there was nothing to do at the plaintiff's store, the plaintiff might order Day to go to the defendant's stand, but in such instances the plaintiff would tell Day what hour to return." The plaintiff in his invoice book designated Day's team as "our team." The defendant testified that the plaintiff wanted "to put on a team by the week, handle it themselves and do their own work." He furnished the plaintiff a team and a driver for $29 a week, including holidays.

On this evidence the jury were authorized to find that Day was the servant of the defendant and not the servant of the plaintiff, and the requests of the defendant were refused properly.

Exceptions overruled.

A. W. Putnam, for the defendant.

W. V. Taylor, for the plaintiff.

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SOLOMON SLOTNICK *vs.* PHILIP SILBERSTEIN & trustee.

Suffolk. March 4, 1915. — May 19, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Witness, Impeachment. *Evidence*, Dictated letter. *Letter*.

Where in an action of contract, in which the evidence upon the single issue being tried is conflicting, and the defendant, in seeking to discredit a witness who has testified in support of the plaintiff's theory of the case, offers in evidence a letter purporting to have been dictated by the witness which is typewritten on paper with the heading of the witness's firm and is signed in typewriting in the name of the witness, in which the writer of the letter makes a strong demand inconsistent with the plaintiff's contention as supported by the witness and in accordance with the defendant's contention, if the witness when shown the letter denies "that he dictated or authorized or knew of this letter until two days after it was sent," and the bookkeeper of the witness's firm, who admittedly wrote out the letter, being called, testifies that he attended to the correspondence of the firm and ran the typewriter and that he was in the habit of signing in typewriting the name of the member of the firm who dictated the letter he was writing, although he denies that the witness dictated or knew of this letter or authorized it in any way before the bookkeeper sent it, but testifies that he cannot understand why he signed it as he did if the witness "did not dictate it," the letter should be admitted in evidence in order that the jury may pass upon the question whether the witness dictated it and, if they find that he did, they may consider it upon the question of the witness's credibility.

PIERCE, J. The plaintiff under an account annexed seeks to recover of the defendant $350 as a balance due for labor performed and materials furnished. After offering evidence tending to show that he made a contract personally with the defendant and that the defendant was the real owner of the premises upon which the work was done and the material furnished, he admitted that his books contained a charge solely against Louis Silberstein, in whose name stood the title to the premises; that his receipts for payments on account ran to Louis Silberstein; and that checks received on account were payable to and indorsed by Louis Silberstein to him; but he contended that the manner of bookkeeping and of receipt and bill making was in accordance with a suggestion of the defendant that it be "done that way." It further was admitted that he made out a bill for some extras to Louis, and that he formerly had done jobs for the defendant personally which he conceded were the defendant's own jobs.

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The paramount question in this case was whether the credits were knowingly and designedly given to Louis Silberstein. Upon that issue the receipts, the credits, the bill for extras to Louis, the fact that the plaintiff formerly had done jobs for the defendant personally which he admitted were the defendant's own jobs, and the fact that he claimed to have made this contract personally with the defendant, charging the work, as requested by the defendant, to Louis, "were competent and strong evidence, but not conclusive" in the defendant's favor. *James* v. *Spaulding*, 4 Gray, 451. To offset and destroy, if possible, the effect of this testimony and the inference that the jury could draw therefrom, the plaintiff was permitted to offer testimony tending to show that the defendant was the real owner of the premises in question and the buildings thereon. To this end the plaintiff called one Bernard Brooker, who testified that he and his brother Morris were partners, under the firm name of Morris Brooker, in the builders' finish business; that he made a contract with the defendant personally, to furnish certain materials for the building upon the premises in question, upon which there was still owing $1,540. In cross-examination it developed that the above named contract followed a proposal contained in a letter dated November 13, 1912, addressed and sent to Mr. L. Silberstein; that the letter was signed "Morris Brooker per Bernard Brooker;" that it was in the handwriting of a younger brother named Benjamin who was not a member of the firm but was the bookkeeper and the person who attended largely to the correspondence. This letter was written as dictated by Bernard Brooker.

The defendant then offered a letter dated May 31, 1913, addressed and sent to Mr. Louis Silberstein, signed "Morris & Bernard Brooker, (by) Bernard Brooker." This letter demanded in forcible language the payment of a balance of $1,040 claimed to be due on the aforesaid contract. The letter was in typewritten form. Like the previous letter it was written on the firm stationery, with the same heading. It admittedly was written by the same bookkeeper who wrote the former undisputed letter.

When shown this letter, the witness Bernard Brooker denied "that he dictated or authorized or knew of this letter until two days after it was sent." The presiding judge excluded this letter

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on the ground that it was not sufficiently shown to have been authorized by the witness, — to which ruling the defendant duly excepted. The defendant then called the bookkeeper who as such wrote both letters and who was still in the employ of the witness. He testified that "he was the bookkeeper of his brothers' firm from June, 1912; that he kept the books, attended to the correspondence and ran the typewriter; that he wrote the letter [proposal] of November 13, 1912, in long hand at the dictation of his brother [the witness] Bernard; that he wrote the letter dated May 31, 1913, in his employers' place and on the employers' typewriter; that he was in the habit of writing, underneath the firm name, that of the partner who dictated the letter, but denied that his brother Bernard dictated, saw or knew of the latter letter or authorized it in any way before he wrote and sent it. He said he could not explain why he put on the words 'Per [by] Bernard Brooker,' if Bernard did not dictate it."

After this testimony the letter again was offered in evidence and was excluded by the presiding judge * on the ground that there was no sufficient evidence of authority of Bernard Brooker to write the letter and sign his name. The defendant again excepted to the ruling.

As bearing upon the single issue in this case the testimony of Bernard Brooker, with the inference that a jury properly might draw therefrom, was of supreme importance. The necessity of breaking its force was obvious; the short and most direct method of so doing was by showing that the acts and conduct of the witness were such as to make it plain that his testimony was manifestly untrue or highly improbable. The letter was excluded because it was not sufficiently proven that the writer had authority to write the letter and to sign the witness's name, or to make any or all of the statements therein contained.

The letter was not offered as the statements of an agent acting within the scope of his authority. It was offered as the dictated word of the speaker, preserved in indisputable form. Nor was there any question of authority, or aught else than the single issue of fact: Did the witness dictate the letter?

The witness and the bookkeeper denied that the letter was dic-

* *Bell*, J. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

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tated, but the jury, in view of all the circumstances, properly could have found that it was dictated.

The evidence offered by the letter in contradiction of the witness was relevant and material and properly could not have been excluded on the ground that it was a collateral issue; *Commonwealth* v. *Hunt*, 4 Gray, 421; *Robinson* v. *Old Colony Street Railway*, 189 Mass. 594; or "because in the opinion of the presiding judge sufficient proof, if believed, already . . . [had] been introduced to establish the fact to be proved." *Perkins* v. *Rice*, 187 Mass. 28, 31.

The exclusion of the letter of May 31, 1913, was error, and the exception must be sustained.

We find no other error in the exclusion of evidence; and as the rulings were clearly right, no discussion is required.

Exceptions sustained.

E. Greenhood, for the defendant.

A. Berenson, for the plaintiff.

C. H. EDEN COMPANY *vs.* HENRY KREY COMPANY & trustee.

Suffolk. March 4, 1915. — May 19, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Finding of trial judge. *Agency. Bailment.*

In an action to recover damages under a special contract by which the plaintiff agreed to furnish certain goods, retaining the title to them, to be sold by the defendant in his store as the plaintiff's agent, where the plaintiff contended that he delivered to the defendant goods of a certain value to be sold under the contract, and that, after deducting in accordance with the terms of the contract commissions and expenses and the value of the goods returned to the plaintiff, a balance was due to the plaintiff, and where a judge, before whom the case was tried without a jury, found on conflicting evidence that such a balance was due, it was *held*, that, the issues being wholly of fact, the finding of the judge was conclusive.

In an action on a special contract, against an agent to whom the plaintiff had entrusted merchandise to be sold upon a commission, for a balance alleged to be due, where the presiding judge refused to rule that the defendant was a gratuitous bailee and consequently was not liable for the goods unless he was negligent in caring for them, it was *held*, that the refusal of the ruling was proper, because, even if the defendant was a gratuitous bailee, his care was not in issue in the case.

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CARROLL, J. The evidence was conflicting, but the judge,* before whom the case was tried without a jury, might have found the facts to be as follows: The plaintiff agreed to supply the defendant with the necessary merchandise for the establishment of a jewelry department in the defendant's store, and to furnish a showcase in which to exhibit the jewelry. The title to the merchandise was to remain in the plaintiff until sold to customers in the usual course of business, and the prices were to be fixed by the plaintiff. The defendant was to furnish store space, manage the department, to have charge of the property and receipts from the sales, and to make weekly reports and remittances to the plaintiff. As compensation for its services and floor space, the defendant was to receive twenty per cent of the gross sales, and in addition a sum not to exceed $6 a week as the wages of a saleswoman. The merchandise covered by the contract was marked with a selling price, it was received by the defendant and was exhibited for sale in accordance with the agreement. The department was maintained for some months and reports and remittances were made to the plaintiff from time to time. When the defendant discontinued the department, the merchandise unsold was packed in boxes, and later, when the plaintiff called for it, it was repacked and reshipped to the plaintiff's place of business and credit was given to the defendant therefor. There were in addition several items of goods which were sold and delivered to the defendant, which had not been paid for by the defendant.

The case was heard before an auditor who found in favor of the plaintiff. At the time of this hearing the declaration contained one count on an account annexed. Later the plaintiff added by amendment a second count for money had and received, and later a third count on a special contract. At the trial in the Superior Court, no question of pleading was raised, and no request was made for any ruling on the separate counts. The trial judge found for the plaintiff.

We are not called upon to decide whether under a special contract like the one in this case, where the title to the property remains in the plaintiff, there can be a recovery for goods sold and delivered, or where an agent or factor does not convert all

* *Hall*, J., who found for the plaintiff. The defendant alleged exceptions.

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of the property entrusted to him into money, there can be a recovery for money had and received. *Allen* v. *Ford*, 19 Pick. 217. *Brown* v. *Holbrook*, 4 Gray, 102. *Hagar* v. *Norton*, 188 Mass. 47.

The third count sets out a special contract and its breach and the plaintiff was entitled to recover under this count. As all the questions involved were questions of fact, such as the amount of goods placed in the custody of the defendant, the amount of returns made, the value of the goods sold and returned to the plaintiff, the expenses and commissions, the finding of the judge on these matters is conclusive. The defendant requested the following rulings:

1. Upon all the evidence the plaintiff cannot recover for any of the goods which shall appear to have been left in the possession or under the care of the defendant.

2. The defendant, upon all the evidence, was the gratuitous bailee of the goods left in its possession by the plaintiff.

3. The defendant is not liable for goods of which it was a gratuitous bailee, without neglect on its part in caring for them.

All of these rulings were refused properly. The goods which were not sold were returned to the plaintiff and credit was given to the defendant for them. The plaintiff did not ask to recover for goods not sold and which remained in the possession of the defendant until returned to the plaintiff. The plaintiff contended that it delivered to the defendant certain property of a certain value; deducting commissions and expenses and goods returned, a certain amount was due and this action is to recover this amount. The second and third requests were refused properly. Even if the defendant was a gratuitous bailee, his care was not in issue in the case. See R. L. c. 68.

Exceptions overruled.

M. S. Holbrook, for the defendant.

C. H. Baldwin, for the plaintiff, submitted a brief.

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MARGARET O'LOUGHLIN *vs.* BAY STATE STREET RAILWAY COMPANY.

Middlesex. March 15, 1915. — May 19, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Street railway. *Carrier*, Of passengers.

Although under ordinary circumstances it is negligence on the part of a conductor of an open street railway car for him to give the signal to start it when a passenger attempting to board the car has one foot on the running board and is not yet fairly on the car, yet these facts are not conclusive, and, where at the trial of an action by an alleged passenger for injuries thus caused there also is evidence that the conductor had stopped the car because directly ahead the highway was crossed at grade by a steam railroad, that the conductor got off the car and went forward for the purpose of signalling to the motorman when it was safe to cross the track, that he saw no one either boarding or leaving the car or on the running board, and that he gave the signal to the motorman to go ahead, that the motorman before starting the car looked behind him and saw no one on the running board or attempting to get on the car and thereupon started the car in the ordinary and usual way, a jury is warranted in finding that there was no negligence on the part of the servants of the street railway company.

A street railway company is not liable for injuries sustained by a person who was attempting to get upon one of its cars as a passenger at the time the car was started when such a passenger was not expected and the conductor and the motorman of the car did not see the person attempting to get on the car and had no reason to expect to see such a person.

CARROLL, J. The plaintiff asserts that she was injured at a point on East Merrimack Street in Lowell, about twenty-five feet westerly from a spur track of the Boston and Maine Railroad which crosses the highway at grade, while attempting to board an open car belonging to the defendant, by reason of the car starting forward with an unusual jerk while she had "one foot on the running board and was about to place the other on the floor of the car." Her evidence tended to show that she gave a signal to the conductor to stop, while she was standing at a regular stopping place, that the conductor gave the signal, the car stopped, that he jumped from the car and ran by her across the spur track, that while the car was at a standstill she took hold of the handlebars and before she was fairly on the car, "two bells

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rung," the car started and she was thrown forward and injured. The defendant contended that the car stopped because of the railroad crossing, that the conductor got off the car and went ahead for the purpose of signalling the motorman when it was safe to cross the track, that he saw no one either boarding or leaving the car or on the running board, that he then gave the signal to the motorman to go ahead and that the motorman before starting the car looked behind and saw no one on the running board or attempting to get on the car or to board it, and thereupon started the car in the ordinary and usual way. The jury returned a verdict for the defendant.

The plaintiff now relies upon requests numbered three and four, which requested the judge * to rule in substance: first, that it was negligence to give the starting signal until the plaintiff was in a position where it was safe to start the car; and second, that if she had her left foot on the running board and her right foot in the air, she was not in a position where it was safe to start the car. The judge told the jury that the plaintiff in boarding the car had the rights of a passenger; that under ordinary circumstances it was negligence to start a car when a person was in the act of boarding it, and that, independent of any jerk or jolt to stop or start a car when a person is getting in or out, was evidence of negligence. This was a correct statement of the law. It is, under ordinary circumstances, evidence of negligence to start a car before a passenger is fairly on a car, but it is not conclusive. It is a question of fact and depends on all the circumstances of the case and the judge could not say as requested by the plaintiff, that because she was on the running board, the defendant was as matter of law negligent in starting the car. This was a question of fact and was properly submitted to the jury with accurate and proper instructions. *Gardner* v. *Boston Elevated Railway*, 204 Mass. 213. *Benoit* v. *Boston & Northern Street Railway*, 216 Mass. 320.

The plaintiff also excepted to that part of the charge wherein the jury were instructed that the negligence of the defendant in starting the car depends upon whether its servants knew or ought to have known that the plaintiff was in the act of getting on the car. There is nothing in this exception. A carrier of

* *Sanderson*, J.

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passengers is not held to the high degree of care required of it for the safety of its passengers, unless it knows what the intending passenger is doing, or under all the circumstances should have known, and this is a question of fact. A carrier is not liable when a passenger attempts to get on a car where he is not expected, or where the agents of the carrier did not see him, or were not to be expected to see him. And in this case the contention of the defendant was that the car stopped for the sole purpose of seeing whether it was safe to cross the track, that no one was seen to get on or off and no one was seen on the running board, and that when the car started no one was in the act of getting on the car. These questions were all for the jury and there was no error in the instruction. *Vine* v. *Berkshire Street Railway*, 212 Mass. 580. The judge in his charge referred to the case of *Sauvan* v. *Citizens' Electric Street Railway*, 197 Mass. 176, as cited in *Martin* v. *Boston Elevated Railway*, 216 Mass. 361, 363, and the plaintiff excepts to what was said as a comment by the judge. What the judge said was not a comment, but was in fact the exact language of the court in *Martin* v. *Boston Elevated Railway*, 216 Mass. 361, 363.*

Exceptions overruled.

The case was submitted on briefs.

J. J. Hogan & W. A. Hogan, for the plaintiff.

J. M. O'Donoghue, for the defendant.

* The passage excepted to as a comment in the judge's charge was as follows: "The testimony of the plaintiff in this very case from which I am quoting shows that at the time of the accident she was well and not suffering from any illness or disability." These words occur in the opinion in *Martin* v. *Boston Elevated Railway*, 216 Mass. 361, 363, except that the word "here" is used instead of the words "in this very case from which I am quoting."

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COMMONWEALTH *vs.* ELM FARM MILK COMPANY.

Suffolk. March 15, 1915. — May 19, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Milk.

The provision of R. L. c. 56, § 55, which prohibits having in possession with intent to sell milk to which water has been added, is violated by having in possession with such intent cream, separated from the milk by a centrifugal process, to which water has been added. Following *Commonwealth* v. *Gordon*, 159 Mass. 8.

COMPLAINT entered on February 2, 1914, in the Superior Court, on appeal from a sentence imposed by the Municipal Court of the Roxbury District of the City of Boston, charging that the defendant on December 13, 1913, at Boston did have in its possession milk to which water had been added with intent unlawfully to sell the said milk within this Commonwealth in violation of R. L. c. 56, § 55.

The defendant was tried before *Aiken*, C. J., upon an agreed statement of facts, the essential part of which is stated in the opinion. The defendant asked the Chief Justice to order a verdict of not guilty. He refused to do so, and the jury returned a verdict of guilty. The defendant alleged exceptions.

J. F. Cusick, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

CARROLL, J. The defendant is charged with violating R. L. c. 56, § 55, which prohibits the keeping, with intent to sell, of milk to which water has been added. A quantity of cream was found in the possession of the defendant which it intended to sell, to which water had been added. This cream was known as heavy cream and contained a greater percentage of milk fat than is required by St. 1907, c. 216, which provides that all cream offered for sale must contain fifteen per cent of milk fat.

The agreed statement of facts shows that heavy cream contains from thirty to forty per cent of milk fat; that cream is a specific

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article of commerce, is separated and manufactured from milk by a centrifugal process and is generally known and dealt with in the trade as cream; and the defendant argues that the milk statute (R. L. c. 56, § 55) is not infringed by the addition of water to cream, because cream and milk are different substances.

Generically, milk and cream are the same thing, and under the statute seeking to prevent the adulteration of milk by the addition of water or any foreign substance, cream is considered to be the same thing as milk. The fact that cream is known as a specific article of commerce and is manufactured as stated in the bill of exceptions, does not make the cream so designated and manufactured under the statute any different from the cream which is separated by some natural process. Neither the trade name nor the method of separating changes the essential nature of the substance.

The statute was passed for a purpose. It was to protect the public health. The adulteration may be equally serious, whether it is in the whole milk or in any of its component parts, such as cream or skim milk, and the protection of the consumer is as much desired in the sale of the component parts of milk as in the sale of milk itself. Under Pub. Sts. c. 57, § 5, a statute similar to the one we are considering, it was decided that the word "milk" as used in that statute was broad enough to include cream. *Commonwealth* v. *Gordon*, 159 Mass. 8.

The defendant relies on *Commonwealth* v. *Boston White Cross Milk Co.* 209 Mass. 30. That case decides that where milk is separated into cream and skim milk and each part is separately treated under a patented process wherein certain chemical changes are involved whereby the milk loses its identity as such and a new and unique product known as "concentrated milk" results, the statute forbidding the addition of water to milk is not violated by the addition of water to this compound because it is not milk, but a different substance. When milk is so completely changed in its essential parts, and a new article of commerce is produced which is so substantially different that it is no longer milk, but is something else, differing from milk in name and nature, like butter, cheese, condensed or concentrated milk, then the statute has no application. But in the case at bar, where cream is separated from the milk, whether the separation is by a natural

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process or by some process of manufacture, the statute controls, and the case of *Commonwealth* v. *Gordon, supra,* is not overruled by *Commonwealth* v. *Boston White Cross Milk Co., supra.*

Exceptions overruled.

COMMONWEALTH *vs.* MARY H. MECKEL.

Suffolk. March 15, 1915. — May 19, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Lord's Day. Common Victualler. License. Words, "Common victualler."

One who is licensed as a common victualler under R. L. c. 102, §§ 1–22, has no right to sell any kind of food on the Lord's day to be taken and carried away, where such sale is not a work of necessity or charity, and, if he does so, he may be convicted and punished under R. L. c. 98, §§ 2, 3.

Assuming that a common victualler, although by R. L. c. 102, § 8, he is not required to keep his place of business open on the Lord's day, lawfully may do so for the purpose of supplying his customers with food to be eaten upon his premises, this gives him no right to sell on that day any food to be carried away.

COMPLAINT entered on October 5, 1914, in the Superior Court, on appeal from a sentence of the Municipal Court of the City of Boston, charging that the defendant on August 23, 1914, that day being the Lord's day, at Boston did sell one pound of bread to one Nordstrom, the same not being then and there a work of necessity or charity.

The defendant was tried before *Keating,* J., upon an agreed statement of facts as follows: On Sunday, August 23, 1914, at 11 A. M. the defendant was engaged in the business of a common victualler and as such common victualler sold a loaf of bread to Nordstrom, the complainant, a stranger to the defendant, to be taken from the defendant's place of business, and such sale was not a work of necessity or charity. A copy of the defendant's license to be a common victualler at the building numbered 300 on Columbus Avenue in Boston until May 1, 1915, was annexed to the agreed statement of facts as a part thereof.

The defendant asked the judge to make the following rulings:

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"1. On the agreed statements of facts the defendant must be found not guilty.

"2. Under R. L. c. 102, § 5, and the terms of her license the defendant as a common victualler was obliged at all times (except when the licensed premises are closed under R. L. c. 100, § 40), to be provided with suitable food for strangers and travellers. A single five-cent loaf or pound of bread is suitable food within the meaning of this statute and the defendant cannot be convicted on this complaint for furnishing such food at 11 A. M. on the Lord's day to a stranger on the licensed premises, to be taken off the premises.

"3. The defendant having a license to do a victualler's business on the Lord's day, in the absence of statutory prohibition or a prohibition in her license, can conduct her victualler's business throughout the Lord's day as on other days of the week and she had a right to sell bread on the Lord's day to be taken from the premises.

"4. The defendant having a victualler's license with permission to do business on the Lord's day has a right to sell a loaf of bread to a stranger or traveller on the licensed premises at 11 A. M. on the Lord's day, and it is immaterial where the stranger eats the bread, even though such a sale is not a work of necessity or charity."

The judge refused to make any of these rulings. The jury returned a verdict of guilty, and at the request of the defendant the judge reported the case for determination by this court. If any of the rulings requested should have been given, a verdict of not guilty was to be ordered; otherwise, the verdict of guilty was to stand.

The case was submitted on briefs.

R. J. Lane, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

CARROLL, J. The defendant was found guilty of doing business on the Lord's day, by selling and delivering a loaf of bread to the complainant on that day, at her shop, to be carried away from the premises. It is agreed that this sale was not a work of necessity or charity. R. L. c. 98, §§ 2, 3.

The defendant relies on the fact that, being licensed as a com-

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mon victualler under R. L. c. 102, §§ 1–22, she had the right to sell food on the Lord's day, even though the food was not to be eaten upon the premises, but was sold to be carried away.

The words "common victualler," in Massachusetts, by long usage, have come to mean the keeper of a restaurant or public eating house. Because of the nature of the business the keeper of such a place must be licensed by the proper authorities and is required by statute at all times to be provided with "suitable food for strangers and travellers," and to have "upon his premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travellers." R. L. c. 102, §§ 5, 6.

These sections of the statute require the common victualler to be provided with suitable food for all purchasers who resort to the place where the business is carried on, for such refreshment as is to be consumed upon the premises. These sections do not require the keeper to be provided with bread, groceries and provisions for all of the public who may come to the shop to purchase such articles and to carry them away.

Assuming that the defendant as a common victualler has the right, although not required by law, to keep open her place of business on the Lord's day (R. L. c. 102, § 8), she can keep it open as such only for the purpose of supplying her customers with food to be eaten on the premises. The common victualler, in keeping an open shop or doing work or business, except for the purposes permitted by law, is like any other person who violates the provisions of the Lord's day statute. The keeper of such a place cannot sell on that day any kind of food to any one, if it is sold to be taken and carried away. *Commonwealth* v. *Graham*, 176 Mass. 5.

According to the terms of the report the verdict of guilty is to stand.

So ordered.

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GEORGE ZINK *vs.* WILLIAM A. FOSS.

Suffolk. March 25, 1915. — May 19, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Wilful misconduct toward trespasser. *Actionable Tort. Dog. Damages. Practice, Civil*, Ordering of judgment by this court.

In an action at common law by a boy twelve or thirteen years of age for personal injuries sustained by reason of the wilful and reckless misconduct of the defendant in setting his dog on the plaintiff when he was a trespasser on the defendant's premises and was lying on the ground after having fallen from a fence, it is not necessary for the plaintiff to allege or to prove that he was in the exercise of due care.

In such an action the plaintiff on obtaining a verdict is not entitled to recover double damages under R. L. c. 102, § 146, on the ground that his injuries were caused by the bite of the defendant's dog; because the recovery is at common law and not under that statute.

Where, in an action of tort at common law for personal injuries caused by the wilful misconduct of the defendant in setting his dog on the plaintiff who had fallen from a fence when he was a trespasser on the defendant's premises, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no occasion for a new trial.

CARROLL, J. The plaintiff was bitten by the defendant's dog. The jury returned a verdict in the plaintiff's favor on the second count of the declaration, which states that the defendant owned and kept a dog; that wilfully, wantonly and recklessly he set the dog on the plaintiff, doing him damage. The damages of $446, as found by the jury, were doubled by the presiding judge * under R. L. c. 102, § 146. The defendant had asked the judge to rule, (1) that the plaintiff was not entitled to recover; and (2) that under the second count the plaintiff was entitled to recover only the actual damages sustained by him.

The second count sets out a good cause of action at common law. It alleges that the plaintiff was injured by reason of the wilful misconduct of the defendant, and there was evidence before the

* *Lawton*, J.

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jury showing that the plaintiff, a boy twelve or thirteen years of age, while a trespasser on the defendant's premises, was bitten by a dog owned by the defendant, who intentionally, wilfully and without just cause, urged and set on the dog to bite the plaintiff while the latter was lying on the ground where he had fallen from a fence. This evidence was contradicted by the defendant, but the credit to be given to it was for the jury.

It is well settled that a trespasser can recover compensation for injuries inflicted upon him by the active, wilful and reckless misconduct of the owner. *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211. *Palmer* v. *Gordon*, 173 Mass. 410. *Riley* v. *Harris*, 177 Mass. 163. *McKeon* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 271. *Aiken* v. *Holyoke Street Railway*, 184 Mass. 269. *Yancey* v. *Boston Elevated Railway*, 205 Mass. 162. Under the circumstances disclosed in the case at bar the due care of the plaintiff was not important and the declaration was not bad because it failed to allege it. In *Aiken* v. *Holyoke Street Railway, supra*, a case of reckless and wilful misconduct on the part of the defendant's employees in injuring a child, the judge instructed the jury that the plaintiff need not show that he was in the exercise of due care; and Knowlton, C. J., speaking for the court, said (at page 272): "The general rule that the plaintiff's failure to exercise ordinary care for his safety, is not a good defence to an action for wanton and wilful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of textbooks."

The defendant's second request should have been given. R. L. c. 102, § 146, makes the owner or keeper of a dog liable in double damages to a person injured by it, but the second count is not drawn under the statute and does not set out a case thereunder. To recover under this statute, the injured person must be in the exercise of due care and this must be properly alleged in the declaration.* *Ryan* v. *Marren*, 216 Mass. 556. *Spellman* v. *Dyer*, 186 Mass. 176. *Riley* v. *Harris*, 177 Mass. 163.

The plaintiff in his second count does not declare that he was in the exercise of due care. He puts his case entirely on the ground

* The writ in this case was dated August 14, 1913, so that the question whether St. 1914, c. 553, applies to actions under R. L. c. 102, § 146, did not arise.

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of the wilful, wanton and reckless act of the defendant in setting his dog on him and injuring him. The essential ground and foundation of the plaintiff's cause of action is this wilful misconduct of the defendant. It does not depend on the circumstance that it was the dog of the defendant which was the instrument by which the defendant's purpose was executed and carried out. It is a common law and not a statutory count, and is predicated entirely on reckless conduct of the defendant. The plaintiff's right to recover under a similar count would be the same, whether he was the victim of an assault by the defendant, or if in any other way, by traps, or spring guns, or dangerous animals, he was injured; and the fact that a dog instead of some other instrument was used, does not entitle the plaintiff to double damages. The right to recover double the amount of damages sustained applies only to cases brought under that statute, and it has no application to a common law claim for damages like the one set out in the second count.

It follows that, while the defendant's exceptions must be sustained for the reason that the damages as found by the jury were doubled by the presiding judge, a new trial is not called for; and judgment is to be entered for the plaintiff for the amount found by the jury, namely, $446. St. 1913, c. 716, § 2.

Ordered accordingly.

J. J. Brennan, for the defendant.

J. H. Baldwin, for the plaintiff.

LOTT MANSFIELD *vs.* THOMAS L. WILES & another.

Suffolk. October 7, 1914. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, Specific performance. *Equity Pleading and Practice*, Appeal, Finding of trial judge.

In suits in equity to enforce the specific performance of contracts to purchase real estate the rule in equity is applicable that the time of performance is not of the essence of the contract unless it has been made so by the parties.

In a suit in equity to enforce the specific performance of a contract to purchase

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certain real estate from the plaintiff in which no time for performance was named, it appeared that the parties after making the contract agreed upon a day of performance which was about three months after the contract was made, but that afterwards by common consent there was a delay by reason of a desultory examination of the plaintiff's title during which the defendant had been urging postponement and wrote to the plaintiff that he was unable to raise the necessary money by the day agreed upon and the plaintiff had arranged to help the defendant raise the money on certain securities of the defendant, that the defendant failed to send his securities to the plaintiff to have the money raised on them but obtained the money otherwise and two days before the day fixed for passing the papers the defendant called on the plaintiff with a certified check for the amount of the purchase money and asked whether the papers were to pass on the day fixed, that the plaintiff told him that certain proceedings in the Probate Court necessary to complete the title would not be concluded by that day, and that about a week after the day fixed for performance the defendant wrote to the plaintiff that "all negotiations are off," whereupon the plaintiff caused the matter of adjusting his title to be completed and three weeks later on a day one month after the day that had been fixed for performance tendered to the defendant a deed conveying the land to him by a good title, which the defendant refused to accept. *Held*, that the case came within the rule in equity that time was not of the essence of such a contract where it had not been made so by the parties and that the plaintiff was entitled to a decree for specific performance.

On an appeal from a final decree in a suit in equity, where it appears that the findings of the trial judge were made under a common law rule that was not applicable to the case and that the judge made no finding of fact under the rule in equity that should have been applied, the consideration of the case in this court is not affected by the decision of the trial judge.

The rule that the decision of a judge sitting in equity will not be reversed on appeal unless clearly erroneous is not applicable to a finding of a trial judge which depends upon an inference drawn by him from evidence not in conflict. In regard to the drawing of such an inference this court stands in the same position that the trial judge stood.

The right of a vendor to enforce in equity the specific performance of a contract to purchase certain real estate is not lost by the existence of a small incumbrance upon the property which is immaterial to the purchaser.

In a suit in equity to enforce the specific performance of a contract to purchase from the plaintiff certain real estate in a small town, it appeared that the land in question had a frontage on a certain street of about thirteen hundred feet and that the house upon it was about eighty feet back from the street, that about fifteen years before the making of the contract sought to be enforced the highway commission had taken a strip of the land along its frontage on the street containing four hundred and ninety-two square feet, which was about one hundred and forty feet long and varied from nothing to six and one half feet in width, that a new State highway had been constructed on that street, that in constructing it the highway commission did not use any of the four hundred and ninety-two feet of land thus taken by them and the original retaining wall never had been disturbed, and that neither the plaintiff nor the defendant knew of the taking until after the filing of the bill. *Held*, that the incumbrance, assuming that it was a valid one, was so small and immaterial that it did not deprive the plaintiff of his right to a decree for specific performance, but

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that the defendant was entitled to a deduction as compensation for the damage, if any, which had been done to the property by the taking by the highway commission.

LORING, J. On November 7, 1912, the defendant Wiles wrote to the plaintiff that he would buy his "place" in Hingham for $14,500 if he would assist him in placing a mortgage on it for the sum of $7,500. We shall hereafter speak of the defendant Wiles as the defendant. This offer was accepted by the plaintiff, and within a few days he arranged for such a mortgage on the premises. Under that arrangement the defendant signed an application for a mortgage on November 12, 1912.

The plaintiff did not own his "place" in Hingham, but had been in occupation of it since December, 1902, under an option of purchase contained in a lease which expired on December 1, 1912. The lease and the option covered not only the tract of land here in question (some fifteen acres in extent), but another tract of some three or four acres on the other side of East Street. No time was specified in the agreement when the papers were to be passed. The defendant refused to accept the certificate of the mortgagee's conveyancer as to title and insisted upon the title being passed by John D. Drum, Esquire. It would seem that the plaintiff, having a right to a good title from those who had succeeded to the title of his lessors, and being bound to give to the defendant a good title, put the defendant's conveyancer, Mr. Drum, in communication with H. F. Atwood, Esquire, who was acting for the successors of the lessors, and left the matter of title to be adjusted between them.

The original lessors were William P. Beale and John C. Beale. Both were non-residents and both died after the date of the lease and before the agreement between the plaintiff and the defendant. Mr. Drum found that John C. Beale died testate, a citizen of New York; that his will had been duly admitted to probate there, but that no ancillary allowance had been made in this Commonwealth. He notified Mr. Atwood of the fact and asked to have the will allowed in this Commonwealth. Mr. Atwood got the necessary papers from New York, and on December 11, 1912, filed a petition for ancillary allowance of the will here. The citation on this petition was returnable on January 27, 1913. During November the option had been extended by the successors of the lessors until

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January 10, and just before January 10 it was again extended until February 3. On January 27, the return day of the petition for allowance of John C. Beale's will in Massachusetts, Mr. Atwood found that he had omitted to ask that the executor be exempt from giving sureties on his bond, and told Mr. Drum that he proposed to file an amended petition to avoid the executor's having to give sureties on his bond. To this Mr. Drum made no objection. At the same time Mr. Drum insisted that a license should be secured from the Probate Court for the sale of the land here in question in order to clear the land from the debts of John C. Beale, and to that Mr. Atwood made no objection. There was a conflict in the testimony as to the time when this last requisition was made by Mr. Drum. Mr. Atwood testified that it was not made until the very end of January. Mr. Drum, on the contrary, testified that it was made much earlier.

The plaintiff seems to have let the defendant know that he looked to the money coming to him under the contract between him and the defendant to enable him to pay the successors of the lessors the money due them under the option. The defendant had difficulty in raising the balance of the purchase money over and above the $7,500 mortgage (which the plaintiff had arranged for in the interest of the defendant) and wrote the plaintiff's attorney to that effect several times during the months of December and January. On December 24, when the time fixed for the expiration of the option was January 10, he wrote to the plaintiff's attorney that within the last two days before the date of the letter he had found that he would not be able to raise the money in time for the passing of the papers on January 10. He ended that letter with the statement that he was just as anxious to purchase as formerly, "except that the delay has worked out so that I will have to wait until about March 1st before I can secure the money." In answer the plaintiff's attorney wrote that the plaintiff doubted whether he could secure a further extension of his option. He ended his letter in these words: "As Mr. Mansfield has been looking entirely to you to raise the money and has no other means of raising it on such short notice, I hope you can advise me at once that you will be able to carry out your part of the agreement." As we have already stated, the option later on was extended until February 3. On January 13 the defendant wrote to the plaintiff's

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attorney that he had just heard from the West and that he would not be able to give a definite answer until Thursday of that week as to his being ready with the money on February 3. Thursday of that week was January 16. In answer the plaintiff's attorney wrote to the defendant that the plaintiff had been relying upon him, the defendant, "entirely" for the money which he had to pay under his option; that "next Thursday is rather late for him to start raising the money," and he hoped the defendant would "give him a definite answer at that time." On Thursday, January 16, the defendant wrote that his securities were not known on this market, but in Philadelphia and Indianapolis only. He then stated that he had "been unable to do anything with it here;" and he offered to let the plaintiff use the securities, which the defendant had been unable "to do anything with," in raising the money which the plaintiff had to pay to meet his option over and above the $7,500 raised by mortgage. On January 22 the plaintiff's attorney wrote to the defendant that the plaintiff had arranged to raise the necessary money with the defendant's securities. But the defendant never sent his securities to the plaintiff; indeed he never sent an answer to this letter of the plaintiff's attorney dated January 22. In place of carrying out the arrangement which the plaintiff had made at his solicitation, the defendant procured from his father-in-law at Indianapolis a check for $7,000. It is called in the evidence a cashier's check, but from the description of it would seem to have been a certified check. With this check he called upon the plaintiff's attorney on the first of February and told him that he had raised the money and asked if the papers were to go through on February 3, the day then fixed for passing the papers. The plaintiff's attorney told him that owing to certain proceedings which had been taken in the Probate Court the papers could not be passed on that day. In a letter dated February 8 (which was Saturday), received by the plaintiff's attorney on February 10, the defendant notified the plaintiff's attorney that he had been told by Mr. Atwood that the title could not go through until the tenth of March, that he had lost patience with the whole affair, and that he wrote "to say that all negotiations are off." Upon receiving this letter the plaintiff's attorney took up the matter of adjusting the title which theretofore, by common consent, had been left to Mr. Atwood and Mr. Drum; and on

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February 24 the will of John C. Beale was allowed by the Probate Court, sureties were given on a bond in a substantial sum, and a "petition for license to sell real estate [was] filed and granted." Thereupon the lessors' successors conveyed to the plaintiff all the land covered by the option, and the executors appointed in Massachusetts of the wills of William P. Beale and John C. Beale made confirmatory releases to him. On March 3 the plaintiff tendered to the defendant a deed conveying the land here in question to him. This tender the defendant refused to accept, and this bill for specific performance was brought on April 16, 1913.

Between March 3, when the plaintiff tendered to the defendant the conveyance of his "place" in Hingham, and April 16, when the present bill in equity was filed, an agreement was entered into between the plaintiff and the defendant which resulted in all the land covered by the option being conveyed to the wife of the defendant Wiles, heretofore spoken of as the defendant. It is apparent that this subsequent agreement was in the nature of a compromise. It has been so treated in effect by both parties, in that no reference has been made to it by either party in support of their respective contentions in this suit.

The judge who heard the case * made two findings of fact. The first is in these words: "I find that, as no time was fixed by the memorandum within which the contract was to be performed, February 3, 1913, was mutually agreed upon as the date for carrying out the agreement, that the time between the making of the contract for the purchase of the property and February 3, 1913, was a reasonable time and that the defendant was not bound to perform or carry out his agreement after that date. I find that the plaintiff tendered a deed to the defendant of the real estate on March 3, 1913. I further find that on that date, moreover, a reasonable time had elapsed for the performance of the contract and the defendant was not bound to accept said deed and carry out said contract."

The second finding is as follows: "I find that the taking of this strip off the front yard, under all the circumstances, made a substantial difference in the premises intended by the parties to

* *Crosby*, J. The final decree in this case was made by *Crosby*, J., as a judge of the Superior Court on December 30, 1913, although it was not entered formally until January 26, 1914. On December 31, 1913, Mr. Justice Crosby became a member of this court.

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be conveyed, and I therefore find that there was a mutual mistake of both, concerning a material matter, and I find that for this reason the plaintiff is not entitled to specific performance." This second finding is based upon the fact that a strip along the front of the plaintiff's "place" containing four hundred and ninety-two square feet had been taken by the highway commission in 1897. The fact that this four hundred and ninety-two square feet had been taken was not known to either of the parties until after the bill in equity now before us was filed.

A final decree reciting these findings was entered dismissing the bill, and from that decree the plaintiff took the appeal which is now before us.

The only defences now insisted upon by the defendant are his right to abrogate the contract as he undertook to do in his letter of February 8, and the mutual mistake which existed by reason of the highway commission's taking of the four hundred and ninety-two square feet. It is not necessary to consider any other possible defences.

The defendant relies upon the case of *Lowe* v. *Harwood*, 139 Mass. 133, in support of the ruling of the judge that the plaintiff's contract came to an end when the defendant undertook to abrogate it because it had not been performed within a reasonable time. But the decision in *Lowe* v. *Harwood* was made in an action at law, and this is a suit in equity. The rule as to when a contract for the purchase and sale of real estate must be performed is not the same in equity as it is at law. At law it must be performed within the time specified in the contract, or (where no time is there specified) within a reasonable time. And if not then performed it may be rescinded by either party, as was held in *Lowe* v. *Harwood*. But in equity, unless time has been made the essence of the agreement, the contract need not be performed within the time therein specified, nor within a reasonable time where no time has been specified in the agreement. There were intimations in *Richmond* v. *Gray*, 3 Allen, 25, and in *Goldsmith* v. *Guild*, 10 Allen, 239, that this rule ought not to obtain in this country where sales of land stand on a somewhat different footing from that on which they stand in England. But the existence of the rule in this Commonwealth was recognized in the case of *Fuller* v. *Hovey*, 2 Allen, 324, and the whole subject (including the earlier cases) was carefully considered in

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Barnard v. *Lee*, 97 Mass. 92, 93, 94. In that case the rule was definitively adopted as the law of the Commonwealth. Gray, J., stated the rule (as adopted in this Commonwealth) in these words: "This equitable doctrine was formerly carried to an unreasonable extent, and the specific performance of contracts enforced after such a lapse of time and change of circumstance as to produce as much injustice as it avoided. In modern times, the doctrine has been more guardedly applied; and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land or other circumstances which would make a decree for the specific performance inequitable." The existence of the rule in Massachusetts has been recognized in the subsequent cases of *Dresel* v. *Jordan*, 104 Mass. 407, *Boston & Worcester Street Railway* v. *Rose*, 194 Mass. 142, and *Staples* v. *Mullen*, 196 Mass. 132.

In the first place time was not made of the essence of the contract here in question by the terms in which that contract was drawn.

In the second place there is nothing in the conditions surrounding the contract from which it could be found that as matter of implication time was of the essence of the contract. The contrary is manifestly the fact. By common consent the adjustment of the title had been left to the conveyancer of the defendant and the counsel of the successors of the lessors, and the somewhat desultory course of proceedings adopted by them never was objected to, certainly not by the defendant. On the contrary it is apparent that until the eighth of February (at any rate) the defendant was urging a postponement of the day for passing the papers because he had not been able to raise the money which he had to raise over and above the $7,500 provided for by the mortgage which the plaintiff had arranged for him. On December 24 the defendant had written to the plaintiff's attorney that he would not be ready with the money before March 1, and as late as January 16 he had written to the plaintiff's attorney that he could not give him "definite word" that he would be ready to carry out the contract on February 3, and offered to let the plaintiff use his securities in raising the money because he had been unable to do anything with them in this market. This offer

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of the defendant had been accepted by the plaintiff, who arranged to raise the money with the aid of the defendant's securities. And of this the defendant was notified on January 22. It was in this state of the matter that the defendant, in place of sending his securities to be used by the plaintiff in raising the money arranged for by the plaintiff at the defendant's solicitation, raised the money himself and undertook summarily to end the contract. This he had no right to do. What the defendant had a right to do at that time was to make time of the essence of the contract by giving the plaintiff notice to that effect. But such notice, if given, would have had to allow the plaintiff a reasonable time in which to perfect the defects in title which, up to that time, by common consent, had been dragging along. A good statement of the rule is made in Frye on Spec. Perf. (5th ed.) § 1094, in these words: "It is not, of course, possible for either party to arbitrarily and suddenly to put an end to negotiations as to title, or other matters pending between the parties. The time specified by the notice must be reasonable, i. e., long enough for the proper doing of the things required to be done." In the place of undertaking to make time of the essence of the contract by giving a notice that the title must be perfected within a reasonable time, the defendant undertook arbitrarily to end the contract. If the plaintiff within a reasonable time thereafter had not proceeded in the matter he well might be held to have acquiesced in the abandonment of the contract which the defendant had undertaken to bring about. But the plaintiff did proceed within a reasonable time. Within twenty-one days after this notice was received by the plaintiff's attorney he had acquired title under the option and at the end of the twenty-one days he tendered to the defendant a deed conveying to the defendant what (in effect) is now admitted to be a good title to the land in question. This was within a reasonable time. So that if the defendant had given the plaintiff the only notice which he had a right to give on the eighth of February, the plaintiff acquired his title within the time he had a right to, and is entitled to specific performance. The case is so clearly within the limits of the doctrine that it is not necessary to go into the matter further. A good collection of cases on the several points will be found in the notes of Professor Ames in his Cases in Equity Jurisdiction, pages 330 to 334.

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It is manifest that the case at bar was not tried in view of the difference between law and equity in the matter of time being of the essence of the contract. No finding of fact was made in this case under the rule in equity that unless made so time is not of the essence of the contract in equity. So far as this question is concerned the case before us is unaffected by a decision by the Superior Court. See in this connection *Rubenstein* v. *Lottow*, 220 Mass. 156.

For these reasons a majority of the court are of opinion that the bill should not have been dismissed on the first ground on which it was dismissed.

This brings us to a consideration of the second ground on which the bill was dismissed in the Superior Court. In Frye on Spec. Perf. (5th ed.) § 1231, it is stated: "On the general principle already stated, the mere fact of the existence of some small or (to the purchaser) immaterial incumbrances on the property is not enough to deprive a vendor of his right to insist on the specific performance of the contract." For a collection of cases, see note to Ames Cases in Equity Jurisdiction, 245, 246.

The finding made in the Superior Court that "the taking of this strip off the front yard, under all the circumstances made a substantial difference in the premises intended by the parties to be conveyed" comes within the rule of *Harvey-Watts Co.* v. *Worcester Umbrella Co.* 193 Mass. 138, and particularly within that rule as applied in *Old Corner Book Store* v. *Upham*, 194 Mass. 101. See in that connection *Hurd* v. *General Electric Co.* 215 Mass. 358. The decision of the issue in the case at bar does not depend upon the credibility of witnesses. But in the case at bar, as in *Old Corner Book Store* v. *Upham*, the decision depends upon the inference to be drawn from evidence not in conflict.

The land here in question had a frontage on East Street of about thirteen hundred feet, and from the plan submitted the house would appear to have been situated some eighty feet back from the side line of the road. The strip of land taken by the highway commissioners was one hundred and forty odd feet long, and varied from nothing to six and one half feet in width. The side line of East Street before the taking by the highway commissioners at this point consisted of a retaining wall about three feet high. It appeared that there were some trees inside this retaining wall.

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But it appeared affirmatively that the setting back of the retaining wall in accordance with the new side line would not have affected the trees. It also appeared that the new State highway had been constructed and was in operation, and that the highway commissioners in constructing the State highway did not use any of the four hundred and ninety-two square feet taken by them, and that the original retaining wall never had been disturbed or the land taken used. It appears therefore that the taking was at most a paper taking of an easement in something less than one thirteen hundredths of the area of the land covered by the contract, and did not in fact affect the attractiveness of the property as a residence. The proposition of law stated by Frye is so well established and this case is so well within that proposition of law that it is not necessary to discuss the matter further.

Both parties have assumed that the taking by the highway commissioners under St. 1894, c. 497, was a valid taking and constitutes a present incumbrance although the owner of the land never had actual notice of the taking and the land has not been used during the sixteen years which have elapsed since the taking was made. The defendant is entitled to a deduction as compensation for the damage, if any, which he has suffered by reason of this taking by the highway commission.

It follows that the decree dismissing the bill was wrong, and that the plaintiff is entitled to specific performance of the contract. Under the agreement of compromise the defendant Wiles must pay him the balance of the purchase money, amounting to $2,500 with interest from the third day of March, 1913, less such sum, if any, as shall be found to be due from the plaintiff by reason of his failure (if there was a failure) to make title to the four hundred and ninety-two square feet taken by the highway commission in 1897; and the defendant's wife must convey to the plaintiff the lot of land on the north side of East Street. The plaintiff is entitled to costs against the defendant Wiles; and it is

So ordered.

The case was argued at the bar in October, 1914, before *Rugg*, C.J., *Loring*, *Sheldon*, *De Courcy*, & *Crosby*, JJ., and afterwards was submitted on briefs to all the justices constituting the court.

J. H. Beale & A. M. Beale, for the plaintiff.

E. R. Anderson, (*H. Guild* with him,) for the defendants.

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DAVID STEIN *vs.* STRATHMORE WORSTED MILLS.

Middlesex. November 19, 1914. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Construction. *Evidence*, Opinion: experts. *Words*, "Net profits."

Where a person employed as the representative and selling agent of a manufacturing corporation was to receive as his compensation a certain sum of money a year and a percentage of the net profits, it was *held*, that the "net profits" would be the difference between a sum made up at the end of the year of the receipts from the business during the year, the amounts due for goods sold, and the value of all stock, materials, machinery, tools, real estate and plant on hand, and another sum made up of the value of all similar physical items at the beginning of the year, of all payments made and liabilities incurred for expenses, and of losses sustained during the year by bad debts or otherwise.

Where, for the purpose of ascertaining the net profits for a certain year of a corporation manufacturing textile products in order to determine the compensation which a selling agent was to receive in the form of a percentage of such net profits, a valuation of the buildings, machinery and like physical property of the corporation at the end of the year must be made, there must be an allowance for depreciation during the year.

In the absence of any definite evidence to the contrary, it cannot be said as a matter of law that a computation of the depreciation during a certain year of the buildings, machinery and other like physical property of a corporation manufacturing textile products by taking the book value of the plant, representing its cost value, and adding to it the actual expenditures for new construction and deducting six per cent upon that total, is wrong.

In computing the net profits during a certain year of a corporation manufacturing textile products, it is right to allow as expenses the amounts actually expended for repairs and maintenance of the plant, this being a separate matter from the allowance made for depreciation.

In a suit in equity against a corporation manufacturing textile products to recover for services of the plaintiff for which the defendant agreed to pay by a percentage of its net profits, where in computing the net profits it is necessary to make an allowance for depreciation of the plant and a master has found that in business like that carried on by the defendant depreciation usually is reckoned by deducting a percentage from the cost value of the plant, the master in the exercise of his discretion properly may find that a witness is qualified to express an opinion as to the ratio of depreciation, if it appears that the witness has been the assistant treasurer of the defendant for two and a half years, that his experience has been mainly that of an accountant, that he previously had worked in the statistical department of an insurance company and in the banking business and for four years had to do with the books of four large worsted mills and knew of their practice as to the charging off of depreciation, that he is familiar with the real estate and plant of the defendant and has made a study of

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depreciation, and if also the witness has been subjected to a lengthy cross-examination as to his method of and reasons for arriving at the ratio of depreciation in which he has exhibited some intelligence respecting the subject and during which the master has had an opportunity to observe his appearance upon the witness stand.

In a suit in equity against a corporation manufacturing textile products to recover for services of the plaintiff for which the defendant agreed to pay him, in addition to a fixed salary, a percentage of its net profits, where in computing the net profits it was necessary to make an allowance for depreciation of the plant, and the defendant in making such allowance had adopted the method commonly prevailing in its kind of business of deducting a percentage and thus deducted six per cent from the cost value of the plant, which a master found was a reasonable allowance for depreciation, it was *held*, that the burden was on the plaintiff to show that six was a wrong percentage to deduct, and that the finding of the master on this point, being warranted by the evidence, could not be pronounced erroneous.

In a suit in equity against a corporation manufacturing textile products to recover for services of the plaintiff as representative and selling agent of the defendant for which the defendant agreed to pay him in addition to a fixed salary for a year a percentage of its net profits during that year, the parties having agreed to consider the business for that year by itself, the defendant cannot be allowed to deduct losses from bad debts incurred from business done before the beginning of the plaintiff's contract, and the defendant, if necessary, must change its usual methods of bookkeeping, in order to ascertain the "net profits" accruing to the defendant's business during the period of the plaintiff's employment.

BILL IN EQUITY, filed in the Superior Court on December 21, 1912, against a corporation engaged in manufacturing textile products, alleging that on October 28, 1908, the plaintiff was employed as the representative and selling agent of the defendant under an agreement by which he was to receive $5,000 a year and eight per cent of the net profits; that the plaintiff rendered the required services and received such salary and $1,124.34 represented by the defendant to be eight per cent of the net profits until December 1, 1910, when a new contract was made under which the plaintiff was to receive $7,500 a year and five per cent of the net profits; that the plaintiff rendered the required services under such new contract and received the agreed salary and $39.11 represented by the defendant to be five per cent of the net profits for the year 1911; that the plaintiff terminated his employment in December, 1911; and that the net profits were greater than the amounts paid to the plaintiff by the defendant as such net profits; with a prayer for an accounting.

The case was referred to William R. Bigelow, Esquire, as master,

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to hear the parties and report his findings to the court together with such facts and questions of law as either party might request. The findings of the master are described in the opinion.

The case was heard by *Wait*, J., upon the exceptions of both parties to the master's report.

The plaintiff's fifth exception was as follows: "For that the master has found that all the bad debts of the defendant which were charged off in October and November of 1911 might properly be charged off at that time against the plaintiff and should be deducted from the gross receipts for that year in arriving at the net profits upon which the plaintiff's commission was based."

The defendant's first objection to the master's report, on which the defendant's first exception was based, was as follows: "The defendant objects to the rulings of the master to the effect that in ascertaining the share of the net profits to which the plaintiff is entitled a proper charge for depreciation should not be considered. The defendant objects to this ruling upon the ground that it is erroneous as a matter of law, the proper method of arriving at net profits being a question of law, the master having found as a fact that if a charge for depreciation is to be taken into account the six per cent charge made by the defendant is a proper one."

The exceptions of both parties were overruled by *Wait*, J., and both the defendant and the plaintiff appealed from the interlocutory decree.

Later *Pierce*, J., made a final decree ordering that the defendant pay to the plaintiff the sum of $4,486.23 together with the costs of suit taxed in the sum of $42.19 and that execution issue therefor. Both parties appealed.

James J. McCarthy, (*R. M. Bowen* with him,) for the plaintiff.

S. S. FitzGerald, for the defendant.

RUGG, C. J. The chief question presented by this case is the meaning of the words "net profits" in a contract between the plaintiff and the defendant, whereby the former became a selling agent for the defendant, a textile manufacturer, at a stated annual salary and in addition a percentage on net profits. "Net profits" have a fairly well defined significance in law. Profits in a going business implies a comparison between two dates. In the contract between these parties those dates are the begin-

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ning and the end of each of the two years as to which the plaintiff seeks to recover his percentage. As applied to these two periods, "net profits" mean a comparison between the assets of the defendant on these dates. Net profits will be represented by the difference between a sum made up at the end of the year of the receipts from the business, the amount due for goods sold, the value of all stock, materials, machinery, tools, real estate, and plant, on hand, and another sum made up of the value of all similar physical items at the beginning of the year, of all payments made and liabilities incurred for expenses, and of losses sustained by bad debts or otherwise. "In other words, they [net profits] would be what should remain as the clear gain of the venture, after deducting from the net value of all assets on hand the capital invested in the business and all outstanding liabilities." Sheldon, J., in *Thurston* v. *Hamblin*, 199 Mass. 151, 158.

In order to ascertain what the difference is between the assets on these two dates, a valuation of approximate correctness ought to be made as of the several material dates. Plainly, where a manufacturing property is involved, the buildings and machinery must be considered.

The controversy in the case at bar centres on the point whether a reasonable depreciation on the building and machinery and such like physical property owned and employed by the defendant in the production of its manufactured goods should be included among the elements making up the amount to be deducted from the receipts. It is clear that the value of buildings and machinery devoted to the manufacture of textile products cannot in the nature of things be the same after a year of use that it was at the beginning. There must have been deterioration. Machinery wears out. Buildings tend toward decay. Both may diminish in value by reason of advance in the state of the art of manufacturing, or by inventions of more effective devices. In order that any such concern may be maintained at uniform efficiency, there must be allowance for depreciation. It has been decided expressly that a reasonable deduction for depreciation should be made in determining net profits in a contract between a manufacturer and agents not unlike the one at bar in its legal aspects. *Stone* v. *Wright Wire Co.* 199 Mass. 306, 308. The same conclusion in principle was reached in *Knoxville* v. *Knoxville Water*

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Co. 212 U. S. 1, 13, and *Conville* v. *Shook*, 144 N. Y. 686. See also in this connection the luminous discussion of "net profits" in the judgment of Fletcher Moulton, L. J., in *In re Spanish Prospecting Co. Ltd.* [1911] 1 Ch. 92, 98 to 101. The contention of the plaintiff, that under his contract there should be no deduction for depreciation before computing his percentage on net profits, cannot be supported.

The depreciation was not calculated by the defendant upon an actual appraisal of machines and buildings in detail, but by taking as a basis the book value of the plant of 1908 and adding to it the actual expenditures for new construction, and then deducting a percentage of six per cent upon that total. The book value perhaps naturally would be the cost value. In the absence of any evidence showing that the book value was not the true value, this method cannot be pronounced wrong as matter of law. It cannot be said that a computation of depreciation by a percentage upon cost is not reasonably accurate for the practical purposes of a going business, in the absence of definite evidence to the contrary.

The amounts actually expended for repairs and maintenance of the plant rightly were allowed as expenses in arriving at net profits. Buildings and machinery must be kept in usable condition in order that the business may go on. That is a quite different matter from depreciation, which is a deterioration arising from age and use and improvements due to better methods, more economical and efficient designs, inventions and general advance in the art, notwithstanding reasonable current repairs.

The master, having found that depreciation usually was reckoned in business like that of the defendant at some ratio of value to the plant, further found that the witness Fisher was qualified to express an opinion as to that ratio of depreciation. Fisher had been the assistant treasurer of the defendant for two and a half years. His experience had been mainly that of an accountant, and he had worked in the statistical department of an insurance company, in the banking business, and for four years he had had to do with the books of four large worsted mills and knew of their practice as to the charging off depreciation. He was familiar with the real estate and the plant of the defendant, with the prices of machinery and its renewals, and had made a study of depreciation.

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This is a slender qualification for a witness. But he was subjected to a lengthy cross-examination as to his method and reasons for arriving at the ratio of depreciation, which exhibits some intelligence respecting the subject, and which well might have been augmented by his appearance on the witness stand. The determination of the competency of an expert witness is usually within the discretion of a trial magistrate. There was no exception to the finding of the master that depreciation commonly was ascertained by a percentage upon the value of the plant, and Fisher was doubtless an expert accountant in regard to this kind of business. With some hesitation we conclude that no reversible error was committed in receiving his testimony, which in substance was confined to the customary percentage of depreciation in this branch of manufacture.

The plaintiff has the burden of proof. He is attacking the correctness and accuracy of the method of reaching the proper item to be deducted from the income as depreciation which was adopted by the defendant. Some amount should be deducted on this account. The defendant adopted the method commonly prevailing of deducting a percentage. The question is whether six was a wrong percentage. Plainly, the finding of the master upon this point cannot be pronounced erroneous.

The master's finding upon depreciation is not quite clear. It is that "The item of $8,500 deducted for depreciation in 1909 was only an estimate." We interpret this to mean that upon the evidence the plaintiff showed to the satisfaction of the master that the depreciation charged by the defendant for that year was not a reasonably accurate estimate nor based upon a "ratio to the value of the plant." There is a finding, however, that the book value of the plant in 1908 was $127,975.31, and that the new constructions during that year amounted to $3,770.64, making a total of $131,745.95 as the value of the plant when the first contract of the plaintiff began. In view of the master's other finding, that a six per cent annual depreciation upon the plant was a reasonable deduction, he should have made such deduction, amounting to $7,904.76, and substituted it for $8,500 in the account. The master's further finding that the depreciation deduction made for 1911 was six per cent on the book value of the plant, shows that the defendant made no error in this respect for

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the year 1911, in view of the other finding that this percentage was reasonable.

During the year 1911 the defendant charged off bad debts amounting to $8,335.75 on sales made before that year. The master finds that, so far as this is a matter of fact, these debts properly might have been charged off at that time and should be deducted from the gross receipts of that year in arriving at net profits. There was error in deducting these losses arising from business done before the beginning of the plaintiff's contract. The agreement was not that net profits should be ascertained and determined solely according to the defendant's usual methods of bookkeeping and habits of conducting business and without any change. Such a contract might have been made. But, instead of making such a contract, the parties agreed that the plaintiff should receive a per cent on the "net profits." These words mean in this connection that the parties have agreed to consider the business of that year by itself, separate and apart from the years which have gone before and are to follow. It is in this respect as if a new partner were admitted to a firm without agreement to assume debts and assets. A new set of books would need to be opened, recording only the transactions of the new year or period. The natural inference from the contract is that the plaintiff as selling agent would find his good judgment and skill in this department reflected in the profits, on which his percentage would be based; while the defendant would see the activity and efficiency of the plaintiff due to this incentive, resulting in increased sales. This may be inconvenient. It may necessitate keeping the books open to determine losses after the contract period has ended. But it is inevitable from the nature of such a contract. The net profits of a business for a specified time may be calculated in accordance with any reasonable method, until the rights of a third person intervene. Then they must be determined in a way to be just to him. In the absence of a definite stipulation to that effect, it would not be fair to one who has become interested in a business on the basis of profits for a fixed time, to share in losses incurred before that time. The expenses, the losses and the gains accruing to the defendant's business during the period of the plaintiff's employment, even though not realized until after its termination, must form the basis on which his percentage must

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be computed. Sufficient facts do not appear in the master's report to enable us to determine this with certainty.

Seemingly there must be a further hearing or agreement by the parties to settle this branch of the case. The plaintiff's fifth exception, relating to this point, must be sustained and all his other exceptions overruled. The defendant's first exception to the master's ruling, in substance that no deduction for depreciation of machinery and plant should be made in ascertaining the net profits, must be sustained and its other exception, being waived, is overruled. The interlocutory decree is modified by sustaining these exceptions. The final decree must be reversed.

So ordered.

WILLIAM FOLLINS, administrator, *vs.* GEORGE A. DILL, trustee.

Suffolk. December 3, 1914. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Negligence, Of one in control of building. *Elevator.*

A lease of "the third floor with the exception of the staircases and elevator wells" of a six story building contained the following provision: "This is a lease of the floor space only excepting that the staircases may be used by the lessee for the purpose of access to and from the herein leased premises. . . . The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on same." A person invited or permitted by the lessee to come upon the leased premises to take away paper stock went up to the third floor in the freight elevator, and, finding no paper stock, attempted to return in the same manner, but the freight elevator had moved upward and he stepped into the elevator well where he supposed the elevator to be and was killed. There was a passenger elevator for the use of the tenants and those having the right of access to their leased premises. In an action against the owner of the building for causing the death, there was evidence, which was admitted without objection, that there was a custom in the building that while delivering freight the person in charge of it might ride on the freight elevator. *Held,* that the plaintiff's intestate had no right to use the freight elevator at the time he was killed, because he was not delivering freight nor in charge of any freight, so that, even assuming that the express covenant in the lease could be changed by a custom of the building, a verdict must be ordered for the defendant.

If the owner of a six story building, the different parts of which are leased to various tenants, retains control of the elevators and maintains a gate on each floor to prevent persons from falling into the well of a freight elevator, and these gates

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are designed to be raised by a person using the freight elevator at the floor at which he wishes to get off and are designed to slide back into place when the elevator leaves that floor, but owing to a want of proper lubrication, which ought to have been done by an employee of the owner of the building, one of these gates remains up when it should have dropped to the floor after the elevator had left the landing place, whereupon a person, to whom the owner of the building owes a duty greater than that which he would owe to a mere licensee or a trespasser, relying on the absence of the gate steps into the elevator well at the place where he supposes the elevator to be and is killed, in an action for causing his death a finding is warranted that the owner of the building was negligent.

A lease of the third floor of a six story building "with the exception of the staircases and elevator wells," which is "a lease of the floor space only," cannot be interpreted to mean that the lessee has control of a gate placed at the well of a freight elevator to prevent persons from falling down the well when the elevator is not there, which has to be raised by a person getting out of the elevator at that floor and is designed to slide back to the floor after the elevator has passed away from it.

A covenant in a lease of the third floor of a six story building "with the exception of the staircases and elevator wells," that "the lessee will defend any law suit and pay any claim or damage arising from any accident or accidents to any person, persons or property in consequence of his occupancy of the herein leased premises," does not protect the lessor against direct liability to one injured through his negligence in regard to an elevator well of the building which is not leased to the tenant nor within the tenant's control.

If a person on the third floor of a six story building, who has landed from a freight elevator at that floor after pushing up a gate, returns a few moments later and sees that the gate is still up, and, relying on that fact and not noticing the absence of the elevator on account of the darkness of the place, thinks that the elevator has remained at the landing, and, stepping where he supposes it to be, falls down the elevator well, he is not negligent as matter of law.

TORT by the administrator of the estate of Richard I. Follins against the owner of the building numbered from 19 to 25 inclusive on Eliot Street in Boston for the death and conscious suffering of the plaintiff's intestate caused by falling down an elevator well in the defendant's building on November 2, 1911, the declaration containing a count for each of these causes of action.

In the Superior Court the case was tried before *Lawton*, J. The jury took a view of the premises. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked for various rulings, including the seventh and eighth which are mentioned in the opinion and which were as follows:

"7. The plaintiff cannot recover under the first count of the declaration.

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"8. The plaintiff cannot recover under the second count of the declaration."

The judge refused to make either of these rulings. The jury returned a verdict for the plaintiff on both counts, assessing the damages for the death in the sum of $1,700 and for conscious suffering in the sum of $500. The defendant alleged exceptions.

The case was argued at the bar in December, 1914, before *Rugg*, C. J., *Braley, Sheldon, De Courcy, & Crosby*, JJ., and afterwards was submitted on briefs to all the justices constituting the court.

C. S. Knowles, for the defendant.

J. G. Walsh, (*W. J. Sullivan* with him,) for the plaintiff.

RUGG, C. J. The plaintiff's intestate received mortal injuries by walking into a dark place where he supposed was an elevator, but which in fact was an elevator well. A crucial question is whether the plaintiff's intestate had a right to use the elevator at the time. Whether he had that right depends in turn upon the right of one Aronson, a tenant of the defendant. The plaintiff's intestate had no greater right than Aronson, by whose invitation or permission he came upon the premises to take away paper stock. Expecting to get such freight from Aronson's premises, he had ridden up in the elevator with a companion and, finding no freight, was trying to ride back on the same elevator when injured. It was a freight elevator exclusively in the control of the defendant. The premises of Aronson were on the third floor of a six story building. Aronson occupied the premises under a written lease from the defendant of "the third floor with the exception of the staircases and elevator wells of the building," which contained this clause: "This is a lease of the floor space only excepting that the staircases may be used by the lessee for the purpose of access to and from the herein leased premises. . . . The lessee agrees to use the freight elevator for freight purposes only and will allow no person to ride on same." There was a passenger elevator for the use of Aronson and those having the right of access to his tenement. It is plain that under the terms of the lease the plaintiff cannot recover. It explicitly prohibits persons from riding on the freight elevator.

It is urged that there was evidence of a custom to control the express clause of the lease. The entire testimony on that point,

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all of which appears to have been admitted without exception, is from the defendant, in these words: "It was the general custom, when Aronson or any tenant on the second floor had some freight to be delivered there, that the man delivering the freight would come to the elevator, put it on the elevator and go with it to the floor. This was a freight elevator, used for raising and lowering freight to various tenants, and used by the tenants and by people going there, for the delivery of freight to the tenants and for the taking away of freight. As far as I know, that was the common custom in the use of that elevator by people having business with the tenants of the building. I presume, in delivering freight or merchandise of any description to the various tenants, the person delivering it would put it on the elevator and then go with it to the floor and deliver it." That testimony does not contradict the terms of the lease. It goes no further than to show that while delivering freight the person in charge of it might ride on this elevator. That apparently was an incident necessary to the use of the elevator exclusively for freight. That is the limit which anybody using the freight elevator in the right of the tenant Aronson could go. The plaintiff's intestate was not doing or intending to do that. It is plain that if Aronson had been in the shoes of the plaintiff's intestate he could not recover. No freight was on the elevator at this time. The plaintiff's intestate and his companion had no freight for Aronson when they went up and they had none to bring down from Aronson's premises. Under these circumstances they had no right to ride down on the freight elevator. They either should have used the passenger elevator or descended the stairs. Even if it be assumed in favor of the plaintiff that an express covenant in an instrument under seal may be changed by conduct, the testimony falls far short of warranting the inference that the express agreement in this lease had been waived or modified to the extent of allowing two persons, the plaintiff's intestate and his companion Cole, to ride up in this elevator to Aronson's floor in the hope of getting freight, and when they failed to find any, to ride down again in the freight elevator, without taking any freight either way. The evidence does not cover any such situation as the present.

The case is plainly distinguishable from *Stewart* v. *Harvard College*, 12 Allen, 58. *Boyle* v. *Columbian Fire Proofing Co.* 182

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Mass. 93, upon which the plaintiff also relies, did not involve the terms of a written lease. Covenants in leases must be given effect, and express contractual rights under written instruments must be preserved even when in conflict with an humanitarian impulse. This defendant is warranted in asking a court of law to protect him against legal liability for the misfortune of which the plaintiff complains. In the opinion of a majority of the court a verdict should have been directed for the defendant, as set forth in his requests numbered seven and eight.

It is not necessary to determine whether the plaintiff's intestate was a licensee or a trespasser, and that question is left undecided. The point whether such an express covenant can be modified by custom or usage, and, if it can be, what evidence is necessary to show such modification, has not been argued, is not necessarily involved, and no opinion is expressed upon it. See *Boruszewski* v. *Middlesex Mutual Assurance Co.* 186 Mass. 589, 593; *Hastings* v. *Lovejoy*, 140 Mass. 261; *Thomas* v. *Barnes*, 156 Mass. 581; *Parrot* v. *Mexican Central Railway*, 207 Mass. 184, 194.

As the case may be tried again, it becomes necessary to pass upon other points which are likely to arise.

The defendant as the owner of the building retained control of the elevator with its appurtenances, but no operator was furnished by him. On each floor there were fire doors between the elevator well and the adjoining leased premises, and on the well side of the doors was a "semi-automatic" gate of wood. Counterweights were connected with it by a rope and pulley. The gates were not lifted automatically as the elevator approached a landing. The operator, when he wished to get off at any floor, pushed up the gate until a steel spring on its inner side came in contact with a leather pad attached to the elevator, and the friction between the spring and the pad held the gate in that position. If the elevator was lowered, the gate was designed to go down with it as far as the floor and protect the landing. If the elevator was raised, as soon as the pad was removed from contact with the spring the gate was designed to drop to its position on the floor. There was evidence that on a number of occasions both before and after the accident the gate at the third floor, where the intestate was injured, was in bad condition, remaining up at times when it should have dropped to the floor after the elevator had left the

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landing place, and that this condition was due to the fact that the runways of the gate were not properly lubricated, work which ought to have been done by an employee of the defendant. This was enough to warrant a finding of negligence on the part of the defendant, provided he owed a duty to the plaintiff greater than that which he would owe to a licensee or trespasser.

The defendant contends that the clause in the lease to the effect that the demised premises included "The third floor with the exception of the staircases and the elevator wells. . . . This is a lease of floor space only . . ." vested control of the elevator gates in the tenant. But this is not a fair construction of the lease. The gates were so connected with the elevator that express and definite stipulation would be required to place responsibility for their care upon a tenant when the elevators remained in care of the landlord. There is nothing inconsistent with this conclusion in *Galvin* v. *Beals*, 187 Mass. 250, relied on by the defendant.

The covenant in the lease that "the lessee will defend any law suit and pay any claim or damage arising from any accident or accidents to any person, persons or property in consequence of his occupancy of the herein leased premises," does not protect the defendant against direct liability to one injured through his negligence upon that portion of the estate not demised to the tenant. Whatever may be the respective rights of the landlord and tenant under such a covenant, it does not prevent a person injured from resorting to the liability of the one whose tort has harmed him. The principle established by *Wixon* v. *Bruce*, 187 Mass. 232, *Cerchione* v. *Hunnewell*, 215 Mass. 588, and like cases, relates to a contractual obligation of the tenant coupled with complete control of the estate whence the injury springs, and not to a case like the present.

The question of the due care of the intestate was for the jury. There was evidence that he had left the elevator at Aronson's place of business after pushing up the gate. When he returned a few moments later he saw that the gate was still up, and, relying on that fact, thought that the elevator had remained by the landing. The place was dark and he did not notice the absence of the elevator platform when he stepped forward into the elevator well. The gate fell into its place when his companion, Cole, walking

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behind him, was about two feet from the well. *Cary* v. *Arlington Mills*, 148 Mass. 338. *Hamilton* v. *Taylor*, 195 Mass. 68. *Humphreys* v. *Portsmouth Trust & Guaranty Co.* 184 Mass. 422. See *Hydren* v. *Webb*, 219 Mass. 542, 546. In the respect that there was a guarding gate in the case at bar, there is distinction between it and *Taylor* v. *Carew Manuf. Co.* 140 Mass. 150; *S. C.* 143 Mass. 470. The case is distinguishable, also, from *Taylor* v. *Hennessey*, 200 Mass. 263, and *Amiot* v. *Foster*, 213 Mass. 573.

Exceptions sustained.

MARY A. NORTON *vs.* CHANDLER AND COMPANY, INCORPORATED.

Suffolk. January 12, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, In maintenance of revolving door, Proximate cause. *Revolving Door. Proximate Cause.*

In an action against the proprietor of a store for personal injuries sustained by the plaintiff from being thrown down by the rapid revolution of a revolving door through which the plaintiff was entering the defendant's store, there was evidence that at the time of the accident the door revolved much more easily and much more rapidly than such doors usually revolved, that after one witness had passed through it and entered the store the door made at least two more revolutions although he had pushed it very gently, that he then gave the door a hard push with his left hand and it made eight or nine revolutions before it stopped, that strips of rubber and felt were fastened along the top and sides of each wing for the purpose of retarding the door when it revolved and to prevent its spinning, that these friction strips were fastened to the wings of the door in such a manner that they could be adjusted from time to time when they were worn down by use, that at the time of the accident the friction strips were narrower and had less contact than was usual with revolving doors, that nothing had been done to the friction strips on this door since it was installed three years before the accident and that no inspection to determine the condition of the strips ever had been made by the defendant. *Held*, that there was evidence for the jury of negligence on the part of the defendant in not inspecting the friction strips and in failing to adjust them on their becoming worn down.

In an action against the proprietor of a store for personal injuries sustained by the plaintiff from being struck in the back and thrown down by a revolving door through which she was entering the defendant's store, where there is evidence that the defendant was negligent in not inspecting the friction strips with which the wings of the door were equipped to control its speed and in failing to adjust these strips on their becoming worn down, and where there also is

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evidence that as the plaintiff was entering the store through the revolving door a man was going out of the store through the same door on the other side of it and that he "went out just like anybody that is in a hurry," if the jury find that the action of this man in going out was the immediate cause of the door spinning round and hitting the plaintiff in the back, this does not prevent a finding that the defendant's negligence was the cause of the plaintiff's injuries, if the jury can and do find that the defendant reasonably ought to have anticipated that a customer might go out through the revolving door in a hurry and thus set it spinning.

It is not necessarily negligent for a woman who is entering a store through a revolving door to fail to take hold of one of the brass railings with which each wing of the door is equipped.

TORT, against a corporation carrying on a retail dry goods store on Tremont Street south of West Street in Boston, for personal injuries sustained by the plaintiff on February 25, 1913, while she was passing through a revolving door maintained by the defendant at the entrance to its store, by reason of the alleged negligence of the defendant in permitting the door to revolve with such rapidity and violence as to throw the plaintiff down and cause her injuries. Writ dated April 4, 1913.

In the Superior Court the case was tried before *White*, J. The essential facts shown by the evidence are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant, and by agreement of the parties reported the case for determination by this court, with the stipulation that, if, upon the evidence properly admitted or any evidence offered and excluded which ought to have been admitted, the ordering of the verdict was right, judgment was to be entered on the verdict for the defendant. If, upon the evidence properly admitted and upon the evidence offered and improperly excluded, the case ought to have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of $3,500 with interest from February 18, 1914, the date of the verdict.

C. S. Knowles, for the defendant.

R. G. Dodge, (*C. W. Putnam* with him,) for the plaintiff.

LORING, J. The plaintiff testified that, as she went through the revolving door on entering the defendant's store, the wing behind her suddenly struck her in the back and threw her forward on to the floor of the store. There was evidence that at the time of the accident this door revolved much more easily and much more rapidly than such doors usually do. One of the witnesses

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testified "that as he passed through it [the revolving door in question] into the store it made two revolutions at least after he passed through, though he pushed it very gently;" and farther on he testified "that after he came out he gave the door a hard push with his left hand and it made either eight or nine revolutions before it stopped." It appeared that there were strips of rubber and felt fastened along the top and sides of each wing, for the purpose of retarding the door when it revolved and to prevent its spinning. These friction strips were so fastened to the wings of the door that they could be adjusted from time to time and in that way their efficiency (in keeping the door from spinning) could be maintained when they were worn down by use. In addition there was evidence that at the time of the accident here complained of the friction strips on the wings of the door were narrower and the contact less than was usual with revolving doors. Finally there was evidence that nothing had been done to the friction strips on this door since it was installed three years before the accident, and no inspection to determine their condition ever had been made by the defendant. This warranted a finding of negligence on the part of the defendant, first, in not inspecting the friction strips, and secondly, in allowing the door to fall into a defective condition through failure to adjust the friction strips on their being worn down.

The defendant's main contention is that this case is governed by *Buzzell* v. *R. H. White Co.* 220 Mass. 129. That case was a case of a revolving door. But beyond that fact there is no similarity between the two cases. That case was submitted to the court on an agreed statement of facts. Among other facts it was agreed that "there was no governing device to control the speed of this door, and no other method of controlling the speed of the door, except such as might be exercised by a person who was passing through it." "These rubber strips [attached to the outer edges of the door] were put on the door for the purpose of preventing the passage of air, and at the same time giving the door an opportunity to swing in its framework without the wood of the wings coming in contact with the framework, and when the rubber strips are not worn and come in contact with the circular framework, they have some retarding effect upon the speed of the door and in preventing the door from spinning." This door "was

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the standard revolving door made by the Van Kannel Revolving Door Company. . . . The Van Kannel Revolving Door Company have installed in this country about forty-five hundred doors of this type, of which about one hundred doors have a device which is described as a governing device, which operates in a manner similar to that of the ordinary liquid cushion spring commonly used on doors. The purpose of the device is to keep the door from spinning."

In other words the door in the case at bar was, or could have been found by the jury to have been, equipped with friction strips to control its speed, while it was agreed in *Buzzell* v. *R. H. White Co.* that the door there in question was equipped with dust strips, not with friction strips, and that that was the common and usual way of constructing revolving doors. It is manifest that the defence successfully invoked by the defendant in *Buzzell* v. *R. H. White Co.* on the facts agreed in that case did not exist under the evidence in the case at bar, and that the grounds of liability made out here did not exist there.

There was evidence that as the plaintiff was going through the revolving door into the store a man was going out of the store through the revolving door, on the other side of it; that the man was in a hurry, and "went out just like anybody that is in a hurry." If the action of this man who was going out was the immediate cause of the revolving door's spinning around and unexpectedly hitting the plaintiff in the back, the connection between the defendant's negligence and the accident to the plaintiff was not necessarily broken thereby. That a customer should go out through the revolving door in a hurry and so set it spinning was, or might have been found to be, something which the defendant reasonably ought to have anticipated. If that was so, or was found to be so, the connection between the two was not broken. See cases collected in *Horan* v. *Watertown*, 217 Mass. 185, 186; *McCauley* v. *Norcross*, 155 Mass. 584; *Oulighan* v. *Butler*, 189 Mass. 287.

The defendant has contended that there was no evidence on which the jury could find that the plaintiff was in the exercise of due care. This contention is based upon the fact that there were brass railings across each wing of the door, and the plaintiff testified that she "couldn't say whether there was a rail across the

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door or whether she had hold of it; that most naturally she would." Even if on this evidence the jury were not justified in finding that she did have hold of the railing, we are of opinion that they could find that she was in the exercise of due care.

By the terms of the report, judgment must be entered for the plaintiff in the sum of $3,500 with interest from February 18, 1914.

So ordered.

HYMAN PHILLIPS *vs.* NATHANIEL A. ELDRIDGE & another & trustee.

Barnstable. January 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Bills and Notes. Evidence, Presumptions and burden of proof.

In an action on a negotiable promissory note, where the defendant has introduced evidence that the note was obtained from him by duress of the payee who indorsed the note to the plaintiff, if this evidence is believed, the burden is on the plaintiff to prove that he was a holder in due course as defined in R. L. c. 73, § 69.

Where in such an action the defendant called the plaintiff and the payee as adverse witnesses and they gave testimony which, if believed, would warrant a finding that the plaintiff was a holder in due course, and this testimony was uncontradicted by any other witnesses, the presiding judge was held not to have been justified in ordering a verdict for the plaintiff, because the jury were not bound to believe the testimony of the plaintiff and the payee any more than if they had been called as witnesses by the plaintiff himself, and it was the duty of the judge to submit the case to the jury.

In the present case a part of the testimony of the two witnesses, if it was believed without believing the rest of their testimony, would have warranted a finding that the plaintiff was not a holder in due course.

CONTRACT on a promissory note of Nathaniel A. Eldridge and Ethel E. Eldridge, his wife, for $1,385 payable to Edward F. Gleason on October 9, 1913, with interest at the rate of six per cent per annum, indorsed by Gleason to the order of the plaintiff and indorsed by the plaintiff in blank.

The answer alleged that the plaintiff was not a holder in due course and that he had notice of the infirmities of the note, that the note was procured from the defendants by the payee Gleason

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by threats of imprisonment of the defendant Eldridge and that the free will of the defendants was overpowered by duress when they were induced to sign the note, which they now repudiated, of all which the plaintiff was alleged to have had notice when the note was negotiated to him.

In the Superior Court the case was tried before *Ratigan*, J. At the close of the evidence, which is described in the opinion, the judge ordered the jury to return a verdict for the plaintiff in the amount of the note with interest at the rate of six per cent per annum from the date of the note, which was October 9, 1911. The defendants alleged exceptions.

G. C. Dickson, for the defendants.

D. Stoneman & A. I. Stoneman, for the plaintiff, submitted a brief.

Loring, J. There was evidence that the note here in suit was procured by duress practiced by the payee on the makers. If that evidence was believed, the plaintiff to recover had the burden of proving that he was a holder in due course as defined in R. L. c. 73, § 69. The plaintiff and the payee, when called as adverse witnesses by the defendants, testified to facts which would have warranted a finding that the plaintiff was a holder in due course. But the jury were not bound to believe their testimony, although uncontradicted, and therefore a verdict for the plaintiff could not have been directed as matter of law.

When testimony warranting a finding that the plaintiff was a holder in due course of a note originating in fraud is given by witnesses called by the plaintiff, it is settled that a verdict cannot be directed for the plaintiff as matter of law. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *Stouffer* v. *Curtis*, 198 Mass. 560. And see generally in this connection *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314; *Demelman* v. *Brazier*, 198 Mass. 458, 465; *Giles* v. *Giles*, 204 Mass. 383, 385; *Leary* v. *William G. Webber Co.* 210 Mass. 68.

The fact that the testimony in the case at bar was given by witnesses called by the defendants as adverse witnesses does not change the result. That was in effect decided in *Emerson* v. *Wark*, 185 Mass. 427.

It should be added that the testimony given by the adverse witnesses in the case at bar did not have to be disbelieved *in toto* to

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warrant a finding in favor of the defendants. The plaintiff testified that in case the note sued on was not paid by the defendants no credit was to be allowed to the payee by reason of the transfer of the note to him by the payee. This testimony, taken in connection with the intimacy between the plaintiff and the payee and the payee's testimony that he was to give the makers credit for $826 in the event of the sale of one of the cranberry bogs,* justified a finding that the plaintiff was not a holder in due course even if the story told by the plaintiff and the payee was not disbelieved *in toto*.

There is nothing in the cases cited by the plaintiff which requires special notice.

Exceptions sustained.

JOHN W. CARTER'S (dependent's) CASE.

Suffolk. January 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act, Dependency.

In a claim under the workmen's compensation act by the daughter of a deceased employee whose death resulted from an injury arising out of his employment, where it appears that the widow of the employee was not living with him at the time of his death and makes no claim as a dependent, that the daughter was over eighteen years of age, that she lived with her mother and, although too ill to go out to work, helped her mother in running the household, that for a year and a half before her father's death her father sent to her from $4 to $5 a week, that this was her only income except pay for two weeks' work so small that it may be disregarded, and that she had saved $100, apparently from the money given her by her father, of which since her father's death from $50 to $60 had been used, it can be found that the daughter at the time of her father's death was wholly dependent upon him for support.

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* Gleason had charged the defendant Eldridge with cheating him in the matter of the sale to him of two cranberry bogs by Eldridge who had procured them from their owners and had misrepresented to Gleason the prices he had paid. The note was demanded by Gleason as a payment of the money improperly obtained by Eldridge in these transactions.

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LORING, J. The record of the Industrial Accident Board begins with a statement that John W. Carter, the employee, received an injury arising out of his employment by an employer insured by the Travelers Insurance Company from which he died; and that the only question was one of dependency. It continues in these words:

"It appeared in evidence that the daughter, Doris Pauline Carter, was living in Portland, Maine, with the mother at the time of the father's death; that her father and mother had not been living together for three years; that she was eighteen years old on the 20th day of October, 1913, and that she was the daughter of John W. Carter. For three years prior to her father's death she had worked intermittently substituting for a florist. Three years before her father's death she had been a waitress in the English Tea Room in Portland, but she could not stay because her health was not good. Two years before her father's death she went to a commercial school for five months, and her father paid $10 a month for her schooling and sent her about $4 a week. She left that school in June, 1912, and up to the time that her father died, in 1913, she had worked only one week in the florist's store, and during that year and a half she had substituted at Wilson's, a Portland grocery, for a week as clerk; the rest of the time she was at home sick. She was living at home with her mother, who boarded a woman in return for the rent. She and her mother divided the table expenses. Her father sent her $4 to $5 a week, and she supported herself with this amount — she bought her clothing and helped her mother. She had no other income except the money that her father sent her, and she was not able to work at the time of the hearing. She further testified that when her father died she had $100 saved in the bank. No information was obtained as to where the $100 came from. Of this amount she had spent $50 or $60 at the time of the hearing. Besides that small amount in the bank, she hasn't anything and is not able to work. She has heart trouble and acute indigestion.

"The mother filed a statement, signed before a notary public, in which she stated that she was not dependent upon her husband at the time of his death. She had put in a claim prior to this, that she was dependent.

"These facts are all the material evidence that there is in the case.

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"Mrs. Carter, the widow, received the notification of the board to be present at the time of the review, but was not present nor did she intend to be, as the board is advised.

"The board finds, on this evidence, that the arbitration committee did not err in its finding of fact, and it affirms and adopts the finding of the committee of arbitration. That finding was: 'We find, therefore, as a fact, that Doris Pauline Carter was the daughter of John W. Carter; that while she is over eighteen years of age, she is physically incapacitated and unable to work and that at the time of her father's death she was wholly dependent upon him, and we find that she is entitled to recover from the Travelers Insurance Company, the insurer in this case, the sum of $7 a week for a period of three hundred weeks, making a total of $2,100, beginning with the date of the injury, December 20, 1913, and that her mother is not a dependent on her own sworn statement, and that the daughter alone is entitled to recover under the workmen's compensation act as being wholly dependent upon the deceased John W. Carter.'"

The learned counsel for the insurer has based much of his argument on an abstract of the evidence taken before the arbitration committee and states that the case was heard by the board upon that abstract of evidence. That is contradicted by the record. The record states that the case was heard by the board on the evidence set forth above.

Apart from the fact that the daughter had savings amounting to $100 at the time of her father's death, there can be no question as to the evidence warranting the finding that she was wholly dependent upon the deceased. The case is the case of a girl fifteen years of age having to give up work as a waitress on account of bad health three years before her father dies. For a year she does nothing. Then she goes to a commercial school for five months. Her father paid for the schooling and for the five months gave her $4 a week. For the remaining year and a half before her father's death she is too ill to work except for a week on each one of two separate occasions. On these occasions she worked as a substitute once at a florist's and once in a grocery store. "The rest of the time she was at home sick." During this period of a year and a half she lived with her mother. The rent was paid by a woman in return for her board, the mother and daughter divided the "table

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expenses," and the daughter, although too ill to go out to work, helped her mother in running the household. The deceased gave the daughter $4 to $5 a week during this year and a half. This was her only income.

There being no evidence as to the origin of the $100 saved by the daughter, it may be taken to have been saved from the money paid her by her father. The question comes to this: Where a daughter for three years before her father's death has had no income except money allowed her by her father and the compensation for two weeks which is so small that it may be disregarded, and is too ill to work, does the fact that at her father's death she had $100 saved from the money given her by her father prevent a finding that she was wholly dependent on her father at the time of his decease? If the sum saved had been sufficient to constitute a means of support or a partial means of support, the existence of the savings would prevent a finding to that effect. But the income from the savings here in question is at the most $4 or $5 a year, and if the principal is used it would last so short a time that it cannot be taken to be a means of even partial support. It appeared at the hearing that since the father's death from $50 to $60 of the principal had been used.

We are of the opinion that the finding was authorized; and the entry must be

Decree affirmed.

L. C. Doyle, for the insurer.

H. T. Richardson, for the dependent daughter, submitted a brief.

MARY I. SULLIVAN *vs.* JOHN B. LLOYD & trustees.

Suffolk. January 20, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Spendthrift. Guardian. Probate Court, Appeal. *Practice, Civil*, Appeal. *Marriage and Divorce.*

The brother of a spendthrift who brought the petition on which the decree of guardianship was made is a person aggrieved by a decree of the Probate Court terminating the guardianship of the spendthrift by accepting the resignation

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of his guardian, and therefore under R. L. c. 162, § 9, such brother may appeal to the Supreme Judicial Court, thereby suspending the operation of the decree and leaving the spendthrift under guardianship.

It seems that the presumptive heirs and next of kin of the spendthrift also are persons aggrieved by such a decree and have a right of appeal, but it was not necessary to decide this in the present case.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry.

CONTRACT against John Bross Lloyd of Winnetka in the State of Illinois for the breach of an alleged contract to marry the plaintiff, William B. Sprout of Brookline and James H. Flint of Weymouth being summoned by trustee process as trustees. Writ dated January 14, 1914.

Personal service was made upon the alleged trustees and service was attempted to be made upon the defendant by leaving a copy of the writ at the Hotel Charlesgate in Boston, alleged to be his last place of abode in this Commonwealth.

On January 24, 1914, Henry D. Lloyd, a brother of the defendant, filed an adverse claim, which he filed again after the entry of the case. On application of the plaintiff an order of court was made under which service was made upon the defendant by publication and by a registered letter which was received by him in Illinois.

In the Superior Court the case was heard by *Jenney*, J., on motions respectively to charge and to discharge the trustees and upon the petition of Henry D. Lloyd as adverse claimant.

It appeared that for some years before June 20, 1913, John B. Lloyd, the defendant, who was unmarried, had been a resident of Massachusetts; that on February 15, 1909, while such resident, he was placed under guardianship as a spendthrift by a decree of the Probate Court for Middlesex County upon a petition filed by his brother Demarest Lloyd; and that William B. Sprout and James H. Flint, the alleged trustees in the present action, were appointed his guardians; that before this appointment the defendant had on January 13, 1909, conveyed substantially all of his property in trust to Mr. Sprout and Mr. Flint; that on February 19, 1913, the guardians filed in the Probate Court their resignations, which were dated February 18, 1913, and were assented to only by the defendant, and a decree was entered by the Probate Court accepting the resignations on the same date; that the docket records of the

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Probate Court did not show that any previous or subsequent notice of these resignations or any notice of the decree was given to any other person; that on March 18 and March 19, 1913, the defendant's brothers, including the original petitioner, Demarest Lloyd, filed claims of appeal from the decrees accepting the resignations, and entered their appeals in the Supreme Judicial Court on March 21, 1913, giving all proper notices; that on March 26, 1913, one of the defendant's brothers, William B. Lloyd, filed petitions in the Probate Court for Middlesex County for the appointment of a new guardian for John B. Lloyd as a spendthrift and for the appointment of a conservator; that on June 19, 1913, waivers of the appeals pending in the Supreme Judicial Court were filed; that on June 20, 1913, a decree was entered by the Supreme Judicial Court confirming the decree of the Probate Court accepting the resignations of the guardians; and that on the same day all parties waived their rights of appeal from this decree; that on June 19, 1913, the defendant executed a conveyance through one Halloran of all his property, including all of his interest in the property held by Mr. Sprout and Mr. Flint under the trust of January 13, 1909, to three trustees, namely, John B. Lloyd, William B. Lloyd and Henry D. Lloyd, being the defendant and two of his brothers; that the trust was accepted by all of the parties thereto, and that subsequently the conveyance was redelivered about June 26, 1913.

The defendant in answer to interrogatories testified that on April 28, 1913, he and the plaintiff mutually promised to marry and that on that day he presented her with an engagement ring; that June 25, 1913, was the day fixed for the wedding, and that on June 20, 1913, he wrote to the plaintiff a letter in which for the reasons there given he asked her to consider their engagement at an end.

The judge made an order for a decree that the claim of the adverse claimant be disallowed, and that William B. Sprout and James H. Flint, the alleged trustees of the defendant, be charged as such trustees for the sum of money disclosed by them in their answer, and, being of the opinion that the correctness of the order ought to be determined before any further proceedings in the Superior Court, reported the case to this court for such determination.

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E. F. McClennen, (*J. J. Kaplan* with him,) for the adverse claimant.

P. Nichols, (*S. H. Hudson* with him,) for the plaintiff.

F. B. Kendall, for the alleged trustees, filed a brief stating that they relied on the brief and argument for the adverse claimant.

LORING, J. 1. The assignment to the new trustees, who are in effect the claimants here, antedates the attachment and must prevail unless it was void or voidable. The plaintiff has not contended that it is void. But she does contend that it is voidable as an assignment to hinder and delay creditors and that it can be avoided by her because she is a creditor. If the plaintiff is not a creditor, this attack upon the assignment fails and the assignment must prevail.

2. When the defendant promised to marry the plaintiff on April 28, 1913, he was under guardianship as a spendthrift. His status as a spendthrift would have come to an end when the resignation of his guardian was accepted by decree of the Probate Court made on February 19, 1913, had not an appeal been taken from that decree. The status of spendthrift does not continue after the person appointed the guardian of the spendthrift ceases to hold that office. *O'Donnell* v. *Smith*, 142 Mass. 505. *Allis* v. *Morton*, 4 Gray, 63, 64. *Harding* v. *Weld*, 128 Mass. 587, 591. *Willwerth* v. *Leonard*, 156 Mass. 277, 279. *Hill* v. *Arnold*, 199 Mass. 109, 110, 111.

But the operation of this decree was suspended by the appeal which was taken from it. The brother of the spendthrift, who brought the petition on which the decree of guardianship was made, was a person aggrieved within R. L. c. 162, § 9. It could not be held that this relative, who could bring a new petition to secure the appointment of a new guardian, is not a person aggrieved by the decree ending the former guardianship by accepting the first guardian's resignation of his office. It would seem that the appeal taken by him and his brothers was also well taken within R. L. c. 162, § 9, because they were the presumptive heirs and next of kin of the spendthrift. See *Lawless* v. *Reagan*, 128 Mass. 592, 593; *Pierce* v. *Gould*, 143 Mass. 234, 235. But upon that point it is not necessary to come to a decision. The appeal suspended the operation of the decree by force of R. L. c. 162, § 16. *Arnold*

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v. *Sabin*, 4 Cush. 46. *Smith* v. *Smith*, 175 Mass. 483. *Tyndale* v. *Stanwood*, 186 Mass. 59; *S. C.* 190 Mass. 513.

3. This brings us to the question of the power of a person under guardianship as a spendthrift to enter into a valid contract to marry.

The first statute in this Commonwealth providing for the appointment of a guardian of a spendthrift is St. 1783, c. 38, § 7. After authorizing the appointment of a guardian of one found to be a spendthrift in order that he might not become a charge upon the public or upon his family, that statute contains this provision: "And no sale or bargain of any real or personal estate, made by such person or persons, after the appointment of guardianship, as aforesaid, shall be held valid in law. And the guardian or guardians that may be thus appointed, shall, in discharging the duties of their appointment, pursue the same method, and be under similar obligations for a faithful discharge of their trust, as guardians appointed for idiots, lunatics or for persons *non compos mentis*." If the matters declared by this statute to be invalid were to be taken to be the limit of the effect of the appointment of the guardian, it well might have been held that one under guardianship as a spendthrift could make a valid contract to marry. But in *Manson* v. *Felton*, 13 Pick. 206, it was held that this clause of St. 1783, c. 38, § 7, was not to be taken to be the limit of the effect of the appointment of a guardian of a spendthrift. The question in that case was whether a promise by the spendthrift to pay a debt contracted by him before the guardianship would take the case out of the operation of the statute of limitations. It was argued that it would because the clause stated above did not cover that case. It was held however that this clause was not to be taken to define the acts made invalid by appointment of a guardian of a spendthrift. It was held on the contrary "that by the appointment of a guardian to a spendthrift, by which the entire control over his whole estate and the administration and management of it are suspended, he becomes incompetent, by his acknowledgment or promise, to continue in force and revive a debt which would be otherwise barred by the statute of limitations." See page 211. It was doubtless as a result of this decision that the clause in St. 1783, c. 38, § 7, set forth above, was not re-enacted in the Revised Statutes. See Rev. Sts. c. 79, §§ 1, 16.

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In spite of the concluding clause of St. 1783, c. 38, § 7, set forth above, it was held in *Boyden* v. *Boyden*, 5 Mass. 427, that guardians of spendthrifts had no control over the persons of their wards. Pursuant to that decision the commissioners for the codification which afterwards became the Revised Statutes, inserted a provision (Commissioners' Report, c. 79, § 17) which went no further than to provide that guardians of spendthrifts should have the care and management of all the estates of spendthrifts. But the Legislature in enacting the Revised Statutes made a change with respect to the control of guardians over the persons of spendthrifts and provided that: "Every guardian, so appointed for a spendthrift, shall have the care and custody of the person of the ward, and the management of all his estate." Rev. Sts. c. 79, § 16.

By the St. of 1818, c. 60, provision was made to prevent gifts, bargains, sales or transfers of real or personal estate while a petition for the appointment of a guardian over the respondent as a spendthrift was pending, on a copy of the complaint and the order of the judge of probate thereon being recorded in the registry of deeds. Some changes in the details of this provision were made by St. 1826, c. 63, § 1. That provision was re-enacted in Rev. Sts. c. 79, § 13, and in Gen. Sts. c. 109, § 10. In *Lynch* v. *Dodge*, 130 Mass. 458, no copy of the complaint and the order of the judge of probate had been filed in the registry of deeds. Under these circumstances it was contended in that case that the indorsement of a promissory note by a ward under guardianship as a spendthrift passed title to the note. It was held that it did not, and it was explained that the provision of Gen. Sts. c. 109, § 10 (which was the re-enactment of St. 1818, c. 60) was not a provision as to the invalidity of acts by a ward under guardianship as a spendthrift, but was a statute for the more limited purpose of preventing contracts, gifts, sales or transfers while the complaint was pending. In that connection Soule, J., speaking for this court, said: "The purpose [for which a spendthrift is put under guardianship] is to take away from him the power to expend and dispose of his estate, to the end that neither he nor his family shall become a public charge. The fact being established that he has the characteristics which constitute a spendthrift, he is, in the interest of the public welfare, put in person and property into the same position with those who are incompetent, by reason of mental weakness, to

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manage their own affairs. The guardian of the spendthrift, like the guardian of an insane person, has the custody of the person of his ward and the management of all his estate. Gen. Sts. c. 109, §§ 9, 12. In order that the guardianship be of any practical value, it is essential that the ward be powerless to make contracts which shall bind him or his estate, and the consequence of the appointment of a guardian of a spendthrift is that, from the time of the appointment, the ward ceases to be *sui juris*, except so far as contracts for necessaries are concerned, and is unable otherwise to deal with any part of his estate." It should be noted in connection with this statement that the exception as to the power of the ward to make contracts for necessaries, originally created by Rev. Sts. c. 79, § 13, now R. L. c. 145, § 8, exists while the complaint is pending only.

In *Mason* v. *Mason*, 19 Pick. 506, a ward undertook to bring an action against his guardian for an assault committed on the ward by the guardian, and the court held that he could not do so. In delivering the opinion in that case, Dewey, J., said (page 508): "And the question is, therefore, shall the spendthrift be allowed to control and squander, if he pleases, the pecuniary damages he may be entitled to recover for his personal injuries, while every dollar of his property and the entire income of it, are locked up as against him . . . . If this cause of action had accrued with another person than the guardian, we think there would be no doubt that the action could be instituted only in the name of the ward by his guardian." The court then went on and decided that an action against the guardian stood on the same footing as an action against a third person, and that no action could be instituted without the guardian's consent. It was suggested in that case that an action could be brought by the ward after the guardian had ceased to hold that office.

It is apparent that the intention of the Legislature was that the guardian of a spendthrift should have the management of the estate of the ward in every particular and to the utmost limit. If a spendthrift without the consent of his guardian can make a valid contract to marry, he would be liable in damages if he afterwards should without cause commit a breach of that contract, and his property (the entire management of which has been put in the hands of the guardian) would be answerable for the breach of the

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contract. On the other hand, if the other party to the contract should refuse to marry the spendthrift in such a case, and the contract was valid, it would follow that the spendthrift of his own motion could institute an action to recover damages without the consent of the guardian, a result not consistent with the decision of this court in *Mason* v. *Mason, ubi supra.*

The ability of one under guardianship as a spendthrift to enter into a valid contract to marry of necessity involves consequences which are not consistent with the provision of the statute giving to the guardian "the management of all his estate," as that provision has been construed by this court. In addition it hardly seems to be consistent with the provision that the guardian of a spendthrift "shall have the care and custody of the person of the ward." Marriage even of a man creates such new relations that it is hardly consistent with a third person's having the care and custody of his person. It was held in *Bartlett* v. *Cowles,* 15 Gray, 445, that marriage of a female minor brought the authority of her guardian to an end. This has now been changed by statute (R. L. c. 145, § 37), so that on the marriage of a female minor the guardian has the management of the ward's estate but not the custody of her person. Doubtless in many cases the marriage of a spendthrift would be a benefit to him. But it is not necessarily so. It would seem that that matter is one which it was the intention of the Legislature should be left to the judgment of the guardian. The marriage of one under guardianship as a spendthrift (see in that connection *Chace, petitioner,* 26 R. I. 351; *Sturgis* v. *Sturgis,* 51 Ore. 10) well may rest on considerations other than those which are decisive of the invalidity of an executory contract to marry.

In view of the history of the legislation which has resulted in R. L. c. 145, §§ 7–11, and the decisions which have been made by this court, we are of opinion that one under guardianship as a spendthrift cannot make a valid contract to marry.

4. The result is that the order disallowing the claim of the adverse claimant must be reversed and an order entered allowing the adverse claimant's claim and discharging the trustees. It is

So ordered.

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PATRICK MAHONEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 22, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Damages, In tort. *Practice, Civil*, New trial.

At the trial of an action for personal injuries by a tailor, whose business consisted of both making and repairing clothes and who, besides having certain stock on hand, always had working for him at least two persons and had a part of the work done by outside tailors, after the plaintiff has introduced without objection evidence tending to show his physical inability to do his usual work consequent upon his injuries, it is error for the presiding judge, against the defendant's exception, to permit the plaintiff to show that the profits of his business for the six months before the accident were $1,200 and that for the corresponding period after the accident they were only $500; because the amount of the profits derived from the plaintiff's business depended on other important elements besides his earning capacity.

Where an error at the trial of an action of tort for personal injuries, in which the plaintiff obtained a verdict, consisted only of the admission of certain incompetent evidence introduced by the plaintiff upon the question of damages, this court in sustaining exceptions alleged by the defendant ordered that the new trial should be confined to that issue.

RUGG, C. J. The only question presented relates to evidence as to damages recoverable for a personal injury arising out of a tort. The plaintiff introduced evidence, without objection, tending to show physical inability to do his usual work consequent upon the injury. He conducted on his own account a tailoring business consisting of both making and repairing clothes. Previous to the accident, he worked at the business himself, doing the cutting needed in the making of new clothes and sometimes assisting in the repairing. He received the customers, took their measurements, and did the marking for repairs. Both before and after the accident, he always had working for him at least two people, sometimes more, and part of the work was done by outside tailors. After the accident, he was able to do none or little of his work for a considerable time. He was unable to grasp his business as before. His memory failed him and trade fell off. Upon this state of the evi-

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dence the presiding judge * admitted testimony, against the exception of the defendant, tending to show that the profits of his business for the six months before the accident were $1,200, and for the corresponding period after the accident were $500. The point to be decided is, whether this evidence was competent.

The principles upon which damages for personal injury caused by tort are to be assessed are settled. In general the plaintiff is entitled to such sum of money as will compensate him for the loss actually sustained by the injury to his person. It is personal and not property damage which may be recovered. As bearing upon the question of compensation, disability and impaired capacity are to be considered. If one receives wages or salary, the amount lost in this regard from the enforced inability to work is a proper element to be considered in assessing damages, but it is not strictly recoverable as wages or salary. The loss of time and the diminution of earning power in the past and in the future are to be considered in estimating the damages. *Sibley* v. *Nason*, 196 Mass. 125, 131. Profits hoped to be derived in the future from a business are too remote and uncertain to be regarded as an element in estimating damages. *Ballou* v. *Farnum*, 11 Allen, 73, 76. That is not a personal injury, but a property damage. Decrease in income is an element to be weighed, when it arises from inability to exercise personal effort or especial efficiency directly producing the income; but not when it is interwoven with profits derived from a business in which capital is employed and to the success of which the service, skill and zeal of others contribute. Personal earnings may be considered, but the more or less uncertain profits from a business venture arising from an investment and from ability in employing and managing labor cannot be taken into account. Where the element of personal expertness is the essential and dominant factor and the capital invested is insignificant as compared with the earnings and merely incidental to the individual capacity which is the fundamental cause of the income, then the income stands on the same basis as wages or salary and may be shown. On this ground the income of the physician or other professional man or author may be shown, although there may be

* *Fox*, J. The jury returned a verdict for the plaintiff in the sum of $1,515; and the defendant alleged exceptions.

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some money invested in a library, instruments and similar collateral necessaries. *Conklin* v. *Consolidated Railway*, 196 Mass. 302, 307. *Nebraska* v. *Campbell*, 2 Black, 590. *Gray* v. *Boston Elevated Railway*, 215 Mass. 143. One is not precluded from recovering loss of earning capacity because he happens to be engaged in business for himself; but he cannot prove what is in substance profits from a business under the semblance of earnings. The business man may show the nature and extent of the business conducted by him, the part actually performed by him, and the compensation usually paid to those performing a like service for others. These are circumstances which may be helpful in determining the value of the time he has lost, in order to reach the ultimate result of just compensation for the injury sustained. But the uncertain profits of a commercial undertaking dependent for its success upon other essential factors beside his personal service are too remote to be of assistance in this respect. These principles are generally recognized. They are the same whether the commercial venture involved is on a large or a small scale. *Stynes* v. *Boston Elevated Railway*, 206 Mass. 75, and cases there collected. *Weir* v. *Union Railway*, 188 N. Y. 416. *Walsh* v. *New York Central & Hudson River Railroad*, 204 N. Y. 58, 68, 72. *Silsby* v. *Michigan Car Co.* 95 Mich. 204. *Bierbach* v. *Goodyear Rubber Co.* 54 Wis. 208. The difficulty arises in their application to the diverse facts of different cases.

Tailoring is a well known branch of trade. It involves the carrying of some stock and, in the case at bar, the employment of two or more persons all the time. Its profits must have been derived to a substantial extent in the nature of things from gain on the sale of goods and employment of labor. It partakes more of the nature of business than personal service.

The evidence to which exception was taken related definitely and unequivocally to the profits derived from the business of the plaintiff. This was something more than the earning capacity of the plaintiff. It was not confined to the value of the plaintiff's service according to the standard of wages paid to others employed to do similar work, nor limited to a description of the nature and extent of the business conducted by him. It therefore should have been excluded in accordance with the principles stated.

As the only error relates to the matter of damages, the new trial

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is to be confined to that issue. *Simmons* v. *Fish*, 210 Mass. 563, 567.

Exceptions sustained.

J. T. Hughes, for the defendant.

E. Field, (*C. C. McCarthy* with him,) for the plaintiff.

JOHN W. CROPPER *vs.* MARY T. GORHAM.
JOSEPH WALKER *vs.* DELLA MACFARLAND.

Berkshire. February 23, 1915. — May 20, 1915.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Assignment, For the benefit of creditors. *Contract*, In writing. *Notice.*

A common law assignment for the benefit of creditors made in consideration of the release by the assignee, who was a creditor of the assignor and signed the instrument of assignment, and by other creditors, who assented in writing to the assignment, of their claims against the assignor, is valid against subsequent attachments made by creditors who did not assent to the assignment.

In an action by the assignee of an insolvent debtor under a common law assignment in writing clearly stated to be for the benefit of creditors to collect a debt admitted to be due to such debtor, testimony of the insolvent assignor that he understood the assignment to be for the benefit of some of his creditors and not for the benefit of all of them cannot affect the construction of the instrument of assignment.

It is not necessary to the validity of a common law assignment for the benefit of creditors that notice of it should be given to the debtors of the assignor.

Although after the making of a common law assignment for the benefit of creditors continued possession by the assignor of the property assigned often is evidence of fraud, yet it is not conclusive evidence, and the circumstances may be such as to show that there was no fraud.

SCIRE FACIAS in the District Court of Southern Berkshire dated June 4, 1913, by John W. Cropper, an execution creditor of Thomas Carder of Pittsfield, against Mary T. Gorham, who had been summoned as trustee in the action in which the execution issued, Joseph Walker of Quincy having been permitted by an order of court of August 12, 1913, to intervene as a claimant; and

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CONTRACT by Joseph Walker, as the common law assignee for the benefit of the creditors of Thomas Carder under an instrument in writing dated January 18, 1913, upon a contract in writing between Carder, doing business under the name of the Carder Monument Company, and Della MacFarland, therein called Mrs. J. MacFarland, of Great Barrington, John W. Cropper having been made a defendant as claimant of the fund upon petitions of interpleader filed by both the defendant and the plaintiff. Writ in the Superior Court dated June 17, 1913.

The first case having come to the Superior Court by appeal, the two cases were tried together before *Hardy*, J. The defendants, Mrs. Gorham in the first case and Mrs. MacFarland in the second case, had no interest in the trial, it being admitted that each of them owed to Carder, the insolvent assignor, the sum of money claimed by Cropper as an execution creditor of Carder and by Walker as the common law assignee of Carder for the benefit of his creditors. The essential facts shown by the evidence are stated in the opinion.

The instrument of assignment under which Walker made his claim was as follows:

"This indenture, made this 18th day of January in the year 1913 by and between Thomas Carder of Pittsfield, Berkshire County, Massachusetts, doing business in said Pittsfield under the name of Carder Monument Company and Joseph Walker, Trustee, of Quincy, in said Commonwealth, doing business in said Quincy under the name of Aberdeen Granite Works. Witnesseth:

"That whereas the said Thomas Carder has been carrying on the business of manufacturing headstones and monuments in said Pittsfield under the said name of Carder Monument Company and has contracted indebtedness, liabilities and obligations to divers and sundry persons and parties:

"Now therefore, in consideration of one dollar and other valuable consideration to said Carder paid by said Walker, Trustee, the receipt whereof is hereby acknowledged, the said Carder does hereby assign, transfer, set over, give, grant, bargain, sell, convey, remise, release and confirm unto the said Joseph Walker, his successors or assigns as Trustee, as hereinafter set forth, all goods, wares, merchandise, fixtures, machinery, stock in trade, whether raw, or in process of manufacture, and all book accounts with full

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power to collect and compel the payment of the same, either in his own name or in the name of said Carder Monument Company, also all policies of fire insurance and all other property and assets of every kind owned by said Carder, wherever the same may be located, but expressly excepting from the obligation of this assignment all property which is by law exempt from being taken on or by any legal process.

"To have and to hold to him, the said trustee above named and his successors or assigns, to his or their use forever, but in trust nevertheless for the uses and purposes following, to wit:

"1. To carry on in the name of said Carder Monument Company, or otherwise, the said business so carried on by said Carder as aforesaid in the same or any other manner, but only until such time as all contracts heretofore entered into by said Carder Monument Company are carried out, with full power and authority to dispose, by sale or otherwise, of all the assets of said Carder Monument Company for the purposes of this trust but with a view to gradually winding up said business, instead of immediately selling the same; and, for the purpose of such carrying on said business as aforesaid, to employ or authorize the employment of the debtor as manager, of said business, and any other persons, as clerks, servants, or otherwise, and to pay out of the trust monies to the debtor, and to any other person who may be so employed, such salary or wages, or remuneration for services rendered, as the said trustee shall think fit. It is hereby agreed and declared that for the purposes of carrying on as aforesaid the said business, it shall be lawful for the said trustee, from time to time, at the expense of the trust estate to procure by purchase, hire or otherwise, such stock in trade, fixtures, materials, chattels or articles as they or he shall think fit.

"And it is further agreed and declared that during such carrying on of the said business, the said trustee shall make or cause to be made, in proper books, full and true entries of all monies received or expended by him in carrying on said business, and shall keep a record of all transactions and matters connected with the same, and shall pay all rents, taxes, and outgoings, including the expense of insurance and repairs. Said books and records to be open to the creditors of said Thomas Carder at any reasonable time upon request in writing.

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"2. After the above referred to contracts of the Carder Monument Company have been carried out, and all monies due said Carder, so far as is reasonably possible, are collected, the said trustee is:

"a. To first pay and retain thereout, all costs, charges and expenses of or incidental to the negotiation, preparation and execution of these presents and of or to the carrying of the same into effect.

"b. And second to pay all claims which are by law entitled to be paid in full and in priority to other debts; so far as the assets will permit.

"c. And finally to pay, divide and distribute the residue of said monies ratably unto and among the said creditors in discharge of their said debts, by such instalments and at such times as said trustee shall think fit, and to pay the surplus, if any, to said Thomas Carder.

"3. All claims of creditors are to be proved in the same manner as claims in bankruptcy proceedings.

" In witness whereof, the parties hereunto set their hands and seals to this and to another instrument of like tenor on the day and year first above mentioned.

Thomas Carder, L.S.
Joseph Walker, L.S.

"We, the following, being the creditors above referred to of said Thomas Carder, do hereby express our consent to the foregoing and in consideration therof, respectfully hereby release the said Thomas Carder from all claims and demands of every name and nature, owing from said Thomas Carder to us.

Amount to Claim.	Name of Creditor.	
$3520.36	Aberdeen Granite Works, Quincy,	L.S.
800.70	Adie and Milne,	L.S.
410.00	Littlejohn Adgers & Milne,	L.S.
385.53	Torreys & Co. M. C.,	L.S.
198.35	Hoyt & Lebouvre Co.,	L.S.
198.80	Edward W. Jones, Jones Bros. Co.,	L.S.
555.00	Everson & Co.,	L.S.
325.60	Geo. H. Bickford, Woodbury Gr. Co.,	L.S."

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At the close of the evidence Cropper asked the judge to make the following rulings:

"1. The so called assignment, being a triparty agreement, viz., an agreement between Thomas Carder, assignor, Joseph Walker, assignee and creditor, and certain other creditors of said Carder, it would not take effect and be binding until signed by all the parties in interest, and if Cropper had not assented to said assignment and had made his attachment by trustee process before the contract of assignment was fully executed, it is not binding upon Cropper and the verdict should be for Cropper.

"2. If Thomas Carder made this assignment for the benefit of a portion of his creditors only, whom he intended to prefer, and intentionally omitted other creditors, including said Cropper, and if Walker supposed that the assignment included all of Carder's creditors, then the assignment is not a valid contract of assignment because there was a misunderstanding between Carder and Walker upon a material point as to the purpose and effect of the contract of assignment.

"3. If Carder was insolvent when he made this assignment, then such assignment is repugnant to the spirit and provisions of the bankruptcy act, so called, and is void as against all creditors not assenting to it, because the insolvency laws and the bankruptcy act require an equal distribution of the estate of an insolvent among all his creditors.

"4. If Cropper did not assent to this assignment, and if Carder did not intend to include him in this assignment, then the assignment is not binding upon Cropper and the verdict should be in his favor."

The judge refused to make any of these rulings, and gave to the jury certain instructions that were requested by Walker. The jury returned a verdict for Walker in each of the cases; and Cropper alleged exceptions.

The cases were submitted on briefs.

H. N. Joyner, for Cropper.

W. A. Burns, J. B. Cummings & J. M. Rosenthal, for Walker.

CARROLL, J. These two actions were tried together. The question in each case is the validity of a common law assignment for the benefit of creditors.

On January 18, 1913, Thomas Carder, while insolvent, made an

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assignment under seal "of all goods, wares, merchandise, . . . and all book accounts" to Joseph Walker, a creditor to whom he was indebted in the sum of $3,500, as trustee for the benefit of his creditors. On January 20 of the same year Walker signed the instrument as trustee and at the same time signed as a creditor, releasing his claim against Carder in these words, "hereby release the said Thomas Carder from all claims and demands of every name and nature, owing from said Carter to us." Seven other creditors of the assignor became parties to the deed of assignment and release, "some of them signed immediately," although one of them did not sign until two months afterwards. Each of the defendants was indebted to the assignor and the amount of the indebtedness was not in dispute.

The conveyance of the debtor's property was founded on a valuable consideration. He was indebted to the assignee. The instrument was under seal, and by executing the deed of assignment the assignee became bound by its terms. Such an assignment is valid against subsequent attaching creditors, and the case is governed by *Reddy* v. *Raymond*, 194 Mass. 367.

The deed of assignment became effective as soon as it was executed by the assignor and by the trustee who was a creditor. It was not necessary to have the consent of all the creditors in order to make it legal; *Everett* v. *Walcott*, 15 Pick. 94; and it was not contended that the assets in the hands of the assignee were sufficient to satisfy the claims of assenting creditors. *Douglas* v. *Simpson*, 121 Mass. 281.

The evidence of Carder that he understood the assignment to be for the benefit of some of his creditors, and not for the benefit of all, even if the evidence was admissible, does not affect the true meaning and construction of the document. The rights of all the parties were governed by the written instrument and its construction was for the court. In the absence of some statutory prohibition, a debtor has the common law right to make an assignment for the benefit of some or all of his creditors, and when fully executed it can be set aside only by proceedings in bankruptcy. "It is true that the assignment could have been avoided by proceedings in bankruptcy seasonably begun or by attaching creditors before it has been fully executed; not however because it was necessarily in fraud of creditors, but in the former case be-

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cause it is the policy of the law to take the distribution of bankrupt estates into its own hands, and in the latter case because until executed by one or more creditors the deed was ineffectual and the property remained the property of the debtor and was attachable as such." Morton, J., in *Reddy* v. *Raymond*, 194 Mass. 367, 369. See *Banfield* v. *Whipple*, 14 Allen, 13.

It was not necessary to give notice of the assignment to the debtors of the assignor. *Thayer* v. *Daniels*, 113 Mass. 129. *Putnam* v. *Story*, 132 Mass. 205. *Kingman* v. *Perkins*, 105 Mass. 111.

While continued possession by the assignor of the goods conveyed to the assignee oftentimes is sufficient evidence of fraud, it is not conclusive under the circumstances disclosed by the evidence. *Rice* v. *Cunningham*, 116 Mass. 466, 470.

The instructions of the presiding judge were sufficient and accurate and the requests of Cropper were properly refused.

Exceptions overruled.

CHARLES A. HANLEY, administrator, *vs.* EASTERN STEAMSHIP CORPORATION.

SAME *vs.* SAME.

Suffolk. March 1, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Venue. *Negligence,* Steamship company, Causing death. *Carrier,* Of passengers. *Ship.*

Under St. 1904, c. 320, which provides that an action to recover for injury or damage received by reason of negligence "shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received," an action by an administrator for injuries received by the plaintiff's intestate by reason of the defendant's negligence cannot be maintained in the county in which the plaintiff is employed as the manager of a department store and in which the plaintiff's intestate was employed as the assistant manager of the same store, if the plaintiff lives and his intestate lived in another county and the intestate's injuries were received in still a third county.

If a passenger on an ocean going steamship has been walking in the evening upon a deck where passengers are permitted to go and where a space from three to five

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feet wide between a life boat and a life raft has been left open and unguarded, and if when such passenger is putting down a camp stool that he has in his hand the vessel gives a lurch and he falls overboard through the open space, he is not negligent as matter of law, because he has the right to assume that during the voyage no place on the vessel where passengers are allowed to go will be left entirely without some guard or a rail at the edge of the deck to prevent a passenger from falling overboard; and it cannot be said as matter of law that such a passenger assumes the risk of such an injury.

The regulations of the United States requiring ocean going vessels to have life boats so placed and fitted that they can be launched safely in less than two minutes do not absolve the owner of such a vessel, when carrying passengers and permitting them to use the deck where the life boats are, from his duty to maintain reasonable guard chains between the ends of two life boats to prevent passengers from falling overboard in the open space between the boats, or, if the only kind of guard consistent with the federal regulations is an insecure one, from his duty to exclude passengers from the immediate neighborhood of the life boats.

When an ocean going vessel is carrying several hundred passengers and on a deck to which the passengers are admitted the open space between two life boats near the edge of the deck is guarded only by a chain which is unfastened easily, it is the duty of the owner of the vessel to make some sort of inspection to protect passengers against the danger likely to follow if the guard chain becomes unfastened; and, if under such circumstances a passenger is injured by falling overboard through the open space between the life boats, in an action to recover for his injuries it is a question for the jury whether such reasonable inspection as the owner ought to have exercised would have revealed the fact that the guard chain had become unfastened.

Without deciding whether at the trial of the action above described a special question to the jury "Was the defendant negligent in failing properly to guard the place where the accident happened?" was objectionable as assuming that the defendant failed to guard the place and merely asking the jury whether such failure was negligence, it was *said*, that it would have been better to have put the question in the form "Did the defendant negligently fail to guard the place where the accident happened?" or in some other form which would have avoided the possible implication that the place was unguarded and that the only point to be decided was whether leaving it unguarded was a negligent act.

Where, in an action by an administrator against a corporation operating a steamship line for causing the death of the plaintiff's intestate by negligently failing to guard the edge of the deck of a vessel of the defendant on which the intestate was a passenger so that he fell overboard and was drowned, the trial proceeded on the theory that the defendant's liability depended upon St. 1907, c. 375, which has no application to the liability of a common carrier of passengers, whereas the defendant's liability was governed wholly by R. L. c. 70, § 6, but no specific exception to this error in procedure was taken at the trial, this court did not find it necessary to determine whether a new trial would have been ordered for this reason alone; because an exception was sustained on another ground which required a new trial.

Where an action by an administrator against a corporation operating a steamship line for causing the death of a passenger was tried erroneously as if the defendant's liability depended on St. 1907, c. 375, whereas that statute had no application and the defendant's liability was governed wholly by R. L. c. 70, § 6,

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it was found not to be necessary to decide whether the questions of the negligence of the defendant in its corporate capacity and of the gross negligence or unfitness of its servants or agents were raised by the defendant's requests for instructions in general terms, although these questions were not thought of by the judge or the counsel at the trial; because there was to be a new trial in which the case would be presented upon the proper issues.

TWO ACTIONS OF TORT against the Eastern Steamship Corporation, a corporation organized under the laws of the State of Maine and having a usual place of business in Boston, by the administrator of the estate of William Hanley, the first action for the death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant and of its servants and agents by reason of which the intestate at about half past nine o'clock on the evening of July 30, 1910, fell from a steamship of the defendant and was drowned, and the second action for the conscious suffering of the plaintiff's intestate immediately preceding his death. Writs in the county of Suffolk dated February 15, 1911.

The amended declaration in each of the cases contained five counts, which were alike in the two cases as to the kind of negligence alleged. In each case the first count alleged negligence in failing to guard properly a dangerous portion of the defendant's steamship; the second count alleged negligence in failing properly to inspect the steamship when a proper inspection would have revealed an unguarded perilous way on the steamship; the third count alleged negligence in failing to light the steamship so as to disclose the dangerous character of certain passageways; the fourth count alleged negligence in failing to provide against the removing or the becoming unfastened of certain guard chains; and the fifth count alleged negligence in failing to provide suitable appliances for the rescue of passengers thrown or falling overboard.

In each of the cases the defendant appeared specially and filed a motion to dismiss the case for want of jurisdiction for the reason that the plaintiff's intestate, at the time of the accident for which the action was brought, lived in Brookline in the county of Norfolk and had no usual place of business in the county of Suffolk, and that the accident for which the action was brought occurred in the county of Essex; also that the intestate's administrator, who brought the action, at the time of the accident and at the time of the bringing of the action, lived in Brookline in the county of Norfolk and had no usual place of business in the county of Suffolk.

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The motions were heard by *Stevens*, J., upon an agreed statement of facts, which was as follows: At the time of the accident for which the actions were brought the plaintiff's intestate lived in Brookline in the county of Norfolk and was and had been for four years employed as assistant manager of the rug department in the store of Henry Siegel and Company in Boston in the county of Suffolk; that otherwise he had no business in the county of Suffolk; that the administrator who brought the actions, at the time of the accident for which the actions were brought and at the time of the bringing of the actions, lived in Brookline in the county of Norfolk and was employed for five years previous to the accident as manager of the rug department in the store of Henry Siegel and Company in Boston in the county of Suffolk, and that otherwise he had no business in the county of Suffolk. It was agreed that the accident that caused the injuries and death on account of which the actions were brought occurred in Essex County.

The defendant asked the judge to make the following rulings:

"1. That the plaintiff's intestate at the time of the accident did not live or have a usual place of business in the county of Suffolk.

"2. That the administrator at the time of the accident and at the time of the beginning of the action did not live or have a usual place of business in said county of Suffolk.

"3. That the fact that the intestate was employed as assistant manager of the rug department of the store of Henry Siegel Company in Boston in the county of Suffolk did not constitute a usual place of business of the intestate within the meaning of the law in the county of Suffolk.

"4. That the fact that the administrator was employed as manager of the rug department in the store of Henry Siegel Company in Boston, in the county of Suffolk, did not constitute a usual place of business of the administrator in the county of Suffolk.

"5. That as a matter of law the defendant's motion to dismiss on the agreed statement of facts must be allowed."

The judge refused to make any of these rulings and denied the motion to dismiss. The defendant appealed. Afterwards exceptions of the defendant to the refusal to make the rulings and to the order denying the motion were allowed by the judge at the

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same time that he allowed the exceptions taken at the trial of the cases.

St. 1904, c. 320, added to R. L. c. 167, § 6, the following provision: "An action against a city, town, person, or corporation to recover for injury or damage received in this Commonwealth by reason of negligence other than that relating to such defect, want of repair or insufficient railing, shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received."

R. L. c. 167, § 10, is as follows: "A transitory action by or against an executor or administrator may be brought in any county in which it might have been brought by or against the testator or intestate at the time of his decease."

Later the cases were tried together before *Stevens*, J. The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover in either of the cases and to order verdicts for the defendant. The judge refused to do this, and the defendant excepted. The defendant then asked the judge to make forty-three rulings, some of which raised the questions that are stated in the opinion and the rest of which were disposed of by the judge's charge. The judge refused to make any of these rulings except as embodied in his charge and submitted to the jury certain special questions, which with the answers of the jury were as follows:

"1. Was the defendant negligent in failing properly to guard the place where the accident happened?" The jury answered, "Yes."

"2. Was the defendant guilty of negligence in failing to inspect the boat at the place where the accident happened?" The jury answered, "Yes."

"4. Was the defendant guilty of negligence in failing to provide against the removing or becoming unfastened of the guard chains where the plaintiff's intestate fell off the boat?" The jury answered, "Yes."

The defendant objected before the charge to the submission by the judge to the jury of each of the questions numbered respectfully 1, 2 and 4, for the reason that there was no evidence that the defendant had failed properly to guard the place where the acci-

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dent happened, and there was no evidence of any negligence on the part of the defendant with respect to the place where the accident happened, and for the reason that the question in form as framed assumed that the defendant had failed properly to guard the place where the accident happened and simply called upon the jury to answer whether or not such assumed failure properly to guard the place was negligence, and for the reason that the submission of each of the questions by the judge to the jury was, both on account of its form and substance, prejudicial to the defendant.

The judge stated that he would instruct the jury fully in his charge in relation to these questions, and the defendant excepted to the submission by the judge to the jury of each of the questions.

The defendant excepted to so much of the charge of the judge as stated that it was the duty of a common carrier to protect its passengers from harm so far as harm reasonably could be anticipated or guarded against.

The jury returned a verdict for the plaintiff in each of the cases, in the first case (for causing death) in the sum of $5,000, and in the second case (for conscious suffering) in the sum of $1,500. The defendant alleged exceptions, including the exceptions taken to the refusal of the rulings requested in regard to the motion to dismiss and to the order denying that motion.

J. T. Hughes, for the defendant.

R. Gallagher, (*C. D. Driscoll* with him,) for the plaintiff.

RUGG, C. J. These are two actions of tort. In one the plaintiff seeks to recover damages for the conscious suffering and in the other the statutory penalty for the death of his intestate, alleged to have been caused by the defendant. The intestate lost his life in connection with being a passenger upon the Bay State, a steamship operated by the defendant between Boston and Portland.

1. A question as to the proper venue of the actions lies at the threshold. It is agreed that the damage and injury were received in Essex County, that the plaintiff and his intestate lived in Norfolk County and were employed as the manager and the assistant manager respectively in one of the departments of a large store in Suffolk County. Whether the actions rightly were brought in Suffolk County depends upon the meaning of "usual place of business" in St. 1904, c. 320, amending R. L. c. 167, § 6, whereby it is provided that actions like these "shall be brought in the county in

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which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received."

In determining the meaning of the statute in this respect, its history is important. St. 1854, c. 322, first permitted transitory actions to be brought in the county where either party had his "usual place of business," but confined its operation to cases where all the parties were residents of the Commonwealth. St. 1856, c. 70, provided that where the plaintiff in a transitory action was a non-resident, the action might be brought in the county in which the defendant lived, or "principally transacts his business, or follows his trade or calling, if he resides in this Commonwealth." But it did not affect St. 1854, c. 322. These two statutes both continued in force until 1860, when they were combined in c. 123, § 1 of the General Statutes, in these words: "Transitory actions, except in cases in which it is otherwise provided, if any one of the parties lives in the State, shall be brought in the county where some one of them lives or has his usual place of business." The reference to "trade or calling" contained in St. 1856, c. 70, was omitted. The commissioners on revision, in their note to this section, give no information as to the purpose or intent of this change, although referring to another change made in the section. Interpreting the law as it stood from 1856 until the enactment of the General Statutes, it is to be observed that, in order to give full force and effect to all the words used in St. 1856, c. 70, as compared with St. 1854, c. 322, it must be presumed that the Legislature intended for the later act a broader scope than for the earlier. It is a well recognized rule in the interpretation of statutes that, where reasonably possible, full force and effect should be given all the words used by the Legislature. Previous to 1854 transitory actions could be brought only in the county in which one of the parties had his residence. When the venue was extended in 1854, it included the county of the usual place of business of either, where both parties resided within the Commonwealth. It may well have been thought in 1856, when the venue for non-resident plaintiffs was extended, that it might include not only the residence and the place of business, but also the place of employment, of resident defendants. If the question had arisen in 1859, it cannot well be doubted that the court would have held that "usual place of business" as used in St. 1854, c. 322, had a more

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restricted signification than the words, "In which he principally transacts his business, or follows his trade or calling" of St. 1856, c. 70. The rational explanation of the action of the Legislature in enacting the General Statutes touching this subject, by employing only the words of the statute of 1854, and omitting entirely those contained in the statute of 1856, appears to us to be that it was intended to recur to the meaning of the words of the earlier statute and discard the broader reference contained in the later statute. This is something more than a mere verbal change in the revision of a statute, which would not affect its meaning, *Shawmut Commercial Paper Co.* v. *Brigham*, 211 Mass. 72, 74, and reaches to a modification of the substance. This interpretation is confirmed by St. 1904, c. 320, which governs the venue of these actions. The purpose of that statute, as was pointed out in *Sandler* v. *Boston Elevated Railway*, 218 Mass. 333, was to relieve the courts of Suffolk County, in which many defendants in actions of negligence have a usual place of business, from the trial of actions where the alleged act of negligence happened in another county and the plaintiff resided or had his usual place of business in another county. Its manifest design was to diminish the number of trials which theretofore could be had in Suffolk County, and thus to save to that county what was felt to be a disproportionate expense in the maintenance of jury trials. It should be interpreted, so far as reasonably practicable, in such way as to further this design.

The words, "usual place of business," apart from special circumstances throwing light upon their meaning, may be given a comprehensive meaning, *Goddard* v. *Chaffee*, 2 Allen, 395, and have been held to include the usual place of labor or employment in the service of another,* although there are contrary decisions.† It follows that the words used in our statute, in the light of its history, do not include a place where one pursues a "trade or calling." The work of the plaintiff and the intestate in a de-

* *Lewis* v. *Davis*, 8 Daly, 185. *Burke* v. *Burke*, 58 N. Y. Supp. 676. *Brassack* v. *Interborough Rapid Transit Co.* 121 N. Y. Supp. 215. *Coker* v. *State*, 12 Ga. App. 425. *Idelett* v. *State*, 81 S. E. Rep. 379. *In re Belcher*, Fed. Cas. 1237. *In re Bailey*, Fed. Cas. 753. *Collector of Taxes of Boston* v. *New England Trust Co. post*, 384.

† *In re Lipphart*, 201 Fed. Rep. 103. *In re Magie*, Fed. Cas. 8951.

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partment store comes rather within the description of "trade or calling" than "place of business." It is employment as distinguished from business. Therefore the venue of these actions was laid improperly in Suffolk County. They should have been brought either in the county of the residence, which was Norfolk, or where the alleged act of negligence occurred, which was Essex.

As under R. L. 167, § 14, the actions may be transferred to the proper county and there tried again, other questions now fairly presented and likely to arise in substance at a new trial are considered.

2. There was evidence tending to show that there was, on a deck of the steamship where passengers were permitted to go, a space, variously estimated at from three to five feet between a life boat on one side and a life raft on the other, where there was no rail, guard or protection to prevent a passenger from walking, being thrown or falling over the ship's side to the water; that, as the plaintiff's intestate, walking along at about half past nine o'clock in the evening with a camp stool in his hand, was in the act of putting it down, the vessel gave a lurch and he fell overboard. If this evidence was believed, it was sufficient to support a finding of due care. It well may be found that a passenger upon an ocean going steamship, during the voyage, may assume that no place where he is allowed to go will be left entirely without some safeguard to prevent a passenger from falling overboard.

3. The manner of the accident was not left wholly to surmise or conjecture. If the testimony just narrated were taken at its full value, it reasonably might have been thought to show that the plaintiff's intestate was caused to fall overboard by the lurch of the ship and not by his own volition or lack of attention.

4. It cannot be said as matter of law that he assumed the risk of such an injury. If the jury believed that there was no adequate cause for him to know that there was no guard or protection, then there was no room for the operation of the maxim *volenti non fit injuria*. Even though it may have been obvious that there was no chain or guard stretching over the space between the life boat and the raft, it might still have been reasonable to assume that there was a rail or other protection at the edge of the deck.

5. It has been earnestly argued in behalf of the defendant that because of the regulations of the United States requiring life boats

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to be so placed and fitted that they can be launched safely in less than two minutes, it should have been ruled that there could be no recovery on the fourth count of the declaration, which alleged the negligence of the defendant to have consisted in failing to provide against the removal or unfastening of chains, which it appeared were provided commonly to protect the space between the life boat and the raft. It contends that nothing more permanent than chains which would unfasten easily could have been used at this place. But it could not have been ruled as matter of law that this was the only practicable protection. What was a sufficient and appropriate guard was a matter to be determined upon all the evidence. If the only kind of guard, consistent with the federal regulation as to launching the life boats, was an insecure one, then it might have been found that passengers should have been excluded from the immediate neighborhood.

6. The jury rightly were instructed that the only negligence for which the defendant could be held responsible was that of its servants or agents. *Joy* v. *Winnisimmet Co.* 114 Mass. 63. But there were several hundred passengers on this boat and necessarily some degree of inspection was required, in the exercise of the high responsibility resting upon the defendant as a common carrier, to see that the various parts and appointments of the vessel remained safe and were not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among so large a number of passengers. The defendant was not obliged to act on the theory that passengers wilfully would remove guards placed for their protection; but, if the peril that was disclosed by the accident was one likely to occur, then the defendant would be required to provide against it, so far as reasonably possible. It properly was left to the jury to determine whether such reasonable inspection as the defendant ought to have exercised, in view of the number of passengers carried and the nature of the particular place and its fittings, and the danger likely to follow from its becoming unguarded, would have revealed the fact that the guard chain had become unfastened. *Peverly* v. *Boston*, 136 Mass. 366. *Glennen* v. *Boston Elevated Railway*, 207 Mass. 497. There is nothing inconsistent with this conclusion in *Lyons* v. *Boston Elevated Railway*, 204 Mass. 227. There was evidence that the place where the ac-

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cident occurred was without chain or other guard for a period of several hours. This might have been found to have been negligence.

7. The other requests of the defendant not covered by what has been said either were given in substance in the fair and comprehensive charge of the presiding judge, or rightly were refused as being directed to fragmentary or indecisive portions of the evidence.

8. The form of questions submitted to the jury might have been modified so as to overcome the objections urged by the defendant. Without deciding that the exceptions would be sustained on this ground, in view of the accompanying explanation of the judge, it would have been better to have put the question in some such form as this: "Did the defendant negligently fail to guard the place where the accident happened?" or in some other way to have avoided the implication that the place was unguarded and the only point to be decided was whether that was a negligent act.

All that has been said under paragraphs numbered 5 to 8, both inclusive, of this opinion, relates solely to the action for conscious suffering.

9. Manifestly there was a mistrial in the action to recover the penalty for causing the death of the intestate. The trial of that action proceeded on the theory that it was governed by St. 1907, c. 375, which is the general statute imposing a penalty for negligently causing the death of a human being in instances where no other remedy is given. But that statute has no application to a common carrier of passengers. That was decided expressly as to street railways by *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8. It is plain from that decision that the liability of such a common carrier as the defendant for causing the death of a passenger depends wholly upon R. L. c. 70, § 6. See also *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582, 586.

But no exception specifically directed to this procedure was taken at the trial. Since the exceptions are sustained on another ground, it is not necessary to determine whether a new trial would have been ordered now for that reason alone. See *Bond* v. *Bond*, 7 Allen, 1, 6.

Neither is it necessary to decide whether the questions of the negligence of the defendant in its corporate capacity or of the gross

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negligence or unfitness of its servants or agents, were raised by some of the defendant's requests for instructions in general terms, although not then thought of. *Parrot* v. *Mexican Central Railway*, 207 Mass. 184, 190. Assuming that these questions are raised upon the present record the rule of damages and the grounds of liability set forth in St. 1907, c. 375, under which the case was tried, are quite different from those established by R. L. c. 70, § 6, under which alone the defendant in law could be held liable. Therefore it appears to be wiser not to decide these points until the case has been tried and the evidence produced with a view to presenting them.

Exceptions sustained.

MATTHEW P. KENNEDY *vs.* HUB MANUFACTURING COMPANY.

Suffolk. March 2, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Exceptions. *Superior Court. Assignment,* Of wages. *Malicious Interference. Abuse of Civil Process. Evidence,* Competency. *Witness,* Cross-examination.

Under R. L. c. 173, § 106, a motion for an extension of the time for filing exceptions may be allowed by a trial judge without any notice to the adverse party if the motion was filed before the time limit expired, although it is the better practice to notify the opposing counsel in cases where this reasonably may be done.

Since St. 1885, c. 384, took effect the Superior Court always is open for business, and the practice founded on the terms of court that existed before that statute no longer has any foundation. Accordingly a judge of the Superior Court may grant a motion for the extension of the time for filing exceptions after the adjournment of the sitting of the court at which the case was tried.

One Berry carried on under the name Hub Manufacturing Company the business of selling wearing apparel at retail largely on credit. A workman in a shoe factory, who owed Berry $3 for an article purchased, executed and delivered to Berry a power of attorney with power of substitution authorizing Berry "to execute and deliver to the said Berry an assignment of my wages or future earnings." Eight years later Berry caused a corporation to be formed called the Hub Manufacturing Company, to which he transferred his business and bills receivable. Berry was president of the corporation. The treasurer of the corporation, acting under the power of substitution in the power of attorney given by the workman eight years before, executed an assignment of the workman's wages due to him from his employers to the "Hub Manufacturing

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Company" and its successors. *Held*, that on these facts a finding was warranted that the account originally held by Berry against the workman had been transferred by him to the corporation, and that the assignment of wages executed under the power of substitution was made to the corporation, the words "Hub Manufacturing Company" not being used in the assignment merely as a trade designation of Berry.

In an action by a workman in a shoe factory against a retail clothing dealer doing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant, if there is evidence that the plaintiff's work was satisfactory and there was no reason for his discharge apart from the annoyance and possible litigation and expense that might be occasioned to his employer in connection with the assignment, and that, after a discussion of the matter between the plaintiff and the superintendent of his employer during eight or ten weeks, the plaintiff was discharged by a foreman of his employer acting under authority from the superintendent, testimony of the plaintiff, that he was discharged by the foreman who said the superintendent "told me to let you go," while not strictly competent as to the alleged statement made by the superintendent to the foreman, was *held* not to have affected injuriously the substantial rights of the defendant, because its purpose was not to show the authority of the foreman to discharge the plaintiff, which had been established by other evidence, but merely to show the fact of the plaintiff's discharge.

In the same case it was *held* that on the evidence in part described above a finding was warranted that the cause of the plaintiff's discharge was the act of the defendant in wrongfully causing the service upon the plaintiff's employer of a copy of the alleged assignment of the plaintiff's wages.

In the same case it was *held* that testimony as to the average wages of those employed in the shop of the plaintiff's employer in the same work in which the plaintiff was employed was competent as tending to show the rate of compensation to which the plaintiff might have attained but for his discharge, there being other evidence that the plaintiff at the time of his discharge was receiving almost as much as such average.

In an action against a corporation by a workman in a factory for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of the plaintiff's wages executed under a power of attorney to execute "an assignment" of wages which the plaintiff gave to a certain person who transferred it to the defendant, which such person had caused to be incorporated, where that person has testified that he does not remember whether before the defendant was incorporated he had served on a previous employer of the plaintiff a copy of a like assignment of the plaintiff's wages executed under the same power of attorney, evidence is admissible in the cross-examination of this witness, for the purpose of attempting to refresh his recollection, that three years before the defendant was incorporated the witness had caused to be served upon another employer of the plaintiff a copy of an assignment of his wages under the same power of attorney, and for this purpose a letter to the witness, which he has acknowledged receiving, in regard to this subject is competent; *also* the fact that two assignments of the plaintiff's wages were executed under a power of attorney that authorized an execution of "an assignment" has a possible bearing upon the issue of malice.

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TORT for an alleged abuse of civil process and malicious interference with the plaintiff's contract of employment, when he was employed as he had been during a long period of time at making heels on shoes at the factory of J. L. Walker and Company at Lynn, by serving on the plaintiff's employer on January 18, 1912, maliciously and with intent to injure the plaintiff a copy of an assignment of wages alleged to have been made by the plaintiff, by reason of which the plaintiff was discharged. Writ in the Municipal Court of the City of Boston dated March 12, 1912.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make certain rulings, which are referred to generally in the opinion. The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $800.

The verdict was returned on January 30, 1914. The twenty days after the verdict within which exceptions might have been filed without an extension of time expired on February 19, 1914. On February 12, 1914, on motion of the defendant the time for filing a bill of exceptions was extended to March 15, 1914. On March 12, 1914, the time was extended further to April 1. On March 30 the time was extended further to April 6, 1914. On April 6 the time was extended further to April 8 and on April 8 was extended further to May 1, 1914.

On April 28, 1914, the defendant filed a bill of exceptions. All the extensions mentioned above which were made after February 19, 1914, were made either *ex parte* or against the objection of the plaintiff.

Later the bill of exceptions was amended by leave of the trial judge, and on November 13, 1914, the judge made a certificate setting forth the foregoing facts in regard to the extensions of the time for filing the exceptions, and made an order allowing the exceptions alleged by the defendant "if it can be done under the state of facts as set forth in the certificate."

On November 19, 1914, the plaintiff alleged exceptions to the allowance by the judge of the defendant's exceptions and to the denial of a motion made by the plaintiff on March 21, 1914, that

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judgment be entered on the verdict. The plaintiff's exceptions were allowed by the judge on the day of their filing.

F. E. Shaw, for the plaintiff.

J. H. Blanchard, (*H. C. Blanchard* with him,) for the defendant.

RUGG, C. J. 1. This case comes before us on exceptions by both parties. Those of the plaintiff are considered first. The verdict was in favor of the plaintiff. The defendant saved exceptions. Before the lapse of twenty days after the rendition of the verdict, the judge who presided over the jury trial, on motion by the defendant and without notice to the plaintiff, extended the time within which its exceptions might be filed, and thereafter made several further like extensions, each being granted before the expiration of the last. The verdict was returned on January 30, 1914, and the defendant's exceptions were filed two days before the following May 1, when the final extension expired.

While it is better practice to notify the opposing counsel in cases where it may be done within reason, nevertheless the court has power *ex parte* to extend the time for filing exceptions. It is provided by R. L. c. 173, § 106, that "further time" beyond the twenty days there specified may be "allowed by the court." Application for the extension of the time for filing exceptions must be made before the time limited has elapsed, and cannot be made thereafter. *Hack* v. *Nason*, 190 Mass. 346. But there is no requirement in the statute for notice to the other party or a hearing. The matter is one in its nature which may be dealt with summarily. It may be presumed that the time would not be extended unless good cause were shown. There is a heavy responsibility upon all judges that there be no unreasonable delay in the administration of justice. Occasions well might arise where it would be difficult to notify adversary counsel, as, for instance, the sickness or court engagements of the attorney or stenographer upon whose work the preparation of the exceptions rests, or unexpected and unavoidable delay in procuring the necessary data. There is nothing in the reason of the law or its express terms which prohibits such extension of time as was given by the judge in the case at bar. *Dolan* v. *Boott Cotton Mills*, 185 Mass. 576, 579, is not inconsistent with this conclusion.

Since the enactment of St. 1885, c. 384, the Superior Court always is open for business, and hence the practice as to terms of

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court theretofore prevailing, as exemplified in *Greenwood* v. *Bradford*, 128 Mass. 296, is no longer applicable, and the judge had jurisdiction to grant an extension after the sitting at which the case was tried had adjourned.

The defendant's exceptions rightly were allowed.

2. The action is for malicious interference with the plaintiff's contract of employment. One material issue was whether the acts of which the plaintiff complained were performed by the defendant or by one Oscar E. Berry. Bearing upon this issue was evidence tending to show that in 1902 Berry was carrying on the business of selling wearing apparel at retail largely on credit, under the name of the "Hub Manufacturing Company," and that the plaintiff executed and delivered to him a power of attorney whereby he was authorized, with power of substitution, "to execute and deliver to the said Oscar E. Berry, an assignment of my wages or future earnings" and at the same time became indebted to him to the amount of $3 for a hat purchased. In 1910 Berry with two others caused the defendant to be incorporated and he transferred to it the business theretofore conducted by him, and in connection therewith "bills receivable, conditional contracts of sale" to the value of $6,000. Berry was president of the defendant corporation and A. T. Thornrose its treasurer, and both were on its board of directors. In 1912, A. T. Thornrose, acting by substitution for Berry under the power of attorney executed by the plaintiff to Berry in 1902, made an assignment of the plaintiff's wages due him from his employers, J. L. Walker and Company, to "Hub Manufacturing Company," which, among other provisions, bound the "successors" of the parties. This was evidence sufficient to support a finding that the account originally held by Berry against the plaintiff was transferred to the defendant on its incorporation, and that the assignment of wages of the plaintiff was made by Thornrose to the defendant. Berry testified to the contrary on both points, but the jury were not bound to believe his denials. The assignment was made to the defendant by name. Whether the defendant was in truth the real assignee or whether the words "Hub Manufacturing Company" were used in the assignment merely as a trade description of Berry was a fact to be determined upon all the evidence. The power of attorney authorized an assignment only to "Oscar E. Berry" and

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said nothing about the Hub Manufacturing Company, although he then was doing business under that name. If Berry had been intended in the assignment, it would have been natural to use his name. The word "successors" in the assignment finds its most appropriate signification in reference to a corporation rather than an individual. Those concerned with the assignment were officers of the corporation. These and perhaps other circumstances required the leaving of the question to the jury and rendered it improper to rule as matter of law that the assignment was to Berry.

3. If the jury reached the conclusion that the assignment was made to the defendant, it might have been found to be responsible for the conduct which led to the plaintiff's discharge. There was testimony to the effect that, shortly after the date of the assignment, it was shown to the plaintiff by the superintendent of his employers, who asked if something could not be done about it, and that thereafter, during the eight or ten weeks of his further employment, there was conversation about the matter twice a week, and that on one occasion a woman "from the defendant company" came to the office of his employer, whither he was called, and in her presence the bookkeeper asked, "if he wished to pay over that money to the Hub Manufacturing Company." The superintendent of the plaintiff's employers, one Williamson, testified that no foreman discharged employees without consulting him. The plaintiff testified that the foreman discharged him, saying, "Mr. Williamson told me to let you go." While it may be doubtful whether this repetition of words was strictly competent, its admission did not in our opinion injuriously affect the substantial rights of the defendant. St. 1913, c. 716, § 1. Its purpose was not to show the authority of the foreman to discharge the plaintiff. That was established by inference from the testimony of the superintendent. The sequence of events, coupled with the testimony of the superintendent that the "plaintiff's work was satisfactory; that he was a sober man; that he attended to his work; that he knew of no reason respecting the work or conduct of the plaintiff for which he should have been discharged at that time," warranted, if it did not require a finding that the reason was the annoyance and possible litigation and expense which might be occasioned to the employers in connection with the assignment.

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It follows that there was evidence sufficient to fasten liability upon the defendant in that it received and accepted through authorized agents the alleged assignment of wages of the plaintiff, *Howland* v. *Blake*, 156 Mass. 543, and that the cause of the plaintiff's discharge was the act of the defendant in causing wrongfully the service of the alleged assignment of the plaintiff's wages upon his employers. *Lopes* v. *Connolly*, 210 Mass. 487. The conclusion of the jury does not rest upon surmise, conjecture or suspicion, but has a foundation in definite facts and rational inferences.

4. The testimony, as to the average wages of those employed in the same work as the plaintiff in the shop of his employers, was competent as tending to show the scale to which the plaintiff might have attained but for his discharge. Indeed, he was receiving almost as much as that.

5. The admission of evidence that in 1907 Berry caused to be served upon other employers of the plaintiff a copy of an assignment of his wages under the same power of attorney, was not error. Berry had testified that he did not remember whether he had served such copy or not. In cross-examination for the purpose of attempting to refresh his recollection in this regard, a letter to him respecting the subject, which he acknowledged receiving, was not incompetent. The power of attorney did not authorize the execution of successive assignments of wages, but only "an assignment." If there had been one assignment in 1907, another utilized by the defendant in 1912 might have a bearing upon the issue of malice.

6. There was no error in denying the defendant's requests for instructions. So far as not given in substance, they were immaterial or unsound. It is not necessary to go through them in detail. The judge performed his functions by stating in plain words the real issues and making clear to the jury what the crucial questions were, without dealing with the requests one by one in his charge.

Plaintiff's exceptions overruled.
Defendant's exceptions overruled.

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HARRIET E. POPE, administratrix, *vs.* HEYWOOD BROTHERS AND WAKEFIELD COMPANY.

Middlesex. March 2, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability. *Agency*. *Practice, Civil*, Exceptions.

In an action by one employed as machinist in a three story factory of the defendant for personal injuries from a freight elevator being put in motion by a fellow workman of the plaintiff on the third floor, when the plaintiff, who was engaged in directing repairs on the elevator well above him, was sitting on the sill of a doorway of the elevator well on the ground floor with his feet resting on the platform of the elevator, it appeared that the accident happened after the workmen's compensation act was in force and that the defendant was not a subscriber under the act, so that under St. 1911, c. 751, Part I, § 1, cl. 2, the defendant was liable to the plaintiff for the consequences of the negligent acts of the fellow servants of the plaintiff in the defendant's employ. There was no evidence showing that any adequate precautions had been taken by the defendant to prevent the use of the elevator while the work of repair was going on either by warning or by instruction or by the posting of notices. There was evidence that one of the defendant's employees had procured some stock on the third floor and went to the elevator to take it down with him, that there he met a fellow employee who was standing near the push button that was used to ring a signal gong on the second story, that he received information from this fellow employee which led him to suppose that the elevator was in running order and he saw this fellow employee put his hand on the button as if to ring the gong, that thereupon he pulled the rope, the elevator started and the intestate was injured. There also was evidence that, although the gong was in working order, it did not sound. *Held*, that the question of the negligence of the defendant in failing to take adequate precautions to prevent the use of the elevator while the work of repair was going on was for the jury, as was the question whether the defendant's employee who failed to sound the gong and who gave the information that it was safe to run the elevator was negligent, and also the question whether the defendant's other employee who started the elevator by pulling the rope without sounding the gong was negligent.

In an action of tort for personal injuries from the starting of a freight elevator, when the plaintiff's intestate was at work in the elevator well, the defendant's bill of exceptions stated that the jury viewed the premises and "with the assent of both counsel" the elevator was operated and its appurtenances inspected, and also stated that there was evidence that at the time of the injury to the deceased the elevator was in the same condition as when viewed by the jury. The bill then stated that the "reference to the view is made a part of the record

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against the objection of the defendant who excepts thereto." *Held*, that the defendant, having presented the bill of exceptions, could not be heard to complain of what it contained, and also that there was nothing to indicate that the defendant was harmed in any way by the reference to the view.

CARROLL, J. The plaintiff's intestate, while in the employ of the defendant as a machinist in its factory on October 11, 1912, suffered an injury from which he later died. The defendant was not a subscriber under the provisions of the St. of 1911, c. 751, and amendments thereto, commonly known as the workmen's compensation act. The plaintiff had a verdict, and the case is before us on the refusal of the presiding judge * to rule that the plaintiff was not entitled to recover.

The employer not being a subscriber, the employee's conduct in assuming the risk or in exercising care was not in controversy, and the only question before the jury was the negligence of the defendant. The defendant is liable for its negligence in the construction, maintenance or operation of machinery, and under Part I, § 1, cl. 2, of the above cited statute it also is liable for the acts of its servants and agents toward their fellow servants in the course of their common employment. If the master adopts an unsafe place for the doing of the work at hand, either in the means or method employed, he may be found to be negligent; and so if his servants, within the scope of their employment, fail to carry out his instructions, or are careless in their use of appliances, or make use of a dangerous method of carrying on the work, either with the consent or against the instruction of the master, he may be found to be negligent.

The deceased employee was engaged in repairing a freight elevator in the defendant's three story factory. The work had been in operation for two or three weeks and at the time of the injury was nearly completed. There were hatchways on the second and third floors through which the elevator passed in ascending and descending. The hatchways of the third story were closed. One

* *Hardy*, J. The action was at common law to recover for personal injuries of the intestate that permanently incapacitated him for work. The writ was dated January 20, 1913. The action was brought by the intestate himself. He died eight months after his injury, and on September 17, 1913, the administratrix of his estate filed a suggestion of his death and was admitted as the plaintiff to prosecute the action. The jury returned a verdict for the plaintiff in the sum of $2,120; and the defendant alleged exceptions.

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side of the hatchways on the second story was open. One Burness, who was helping the intestate, was standing on the ladder between the second and the third stories, oiling the runs. The intestate was sitting on the doorsill on the ground floor, and was in this place for the purpose of directing Burness in the work and preventing the use of the elevator while the work of repair was in progress. The elevator platform was on the ground floor, from fifteen to eighteen inches below the doorsill, and the feet of the intestate were upon the floor of the elevator. A fellow employee in the third story started the elevator without warning and the intestate was so injured thereby that eight months later he died as a result.

There was evidence that if the elevator was locked it could not have started; but to carry on the work of repair, it had to be unlocked.

There was no evidence showing that any adequate precautions had been taken by the defendant to prevent the use of the elevator while the work of repair was going on, either by warning, instruction or by the posting of notices. Under these circumstances, considering the peril to which the men engaged in the work were exposed, we think that the negligence of the defendant was a question for the jury. "The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject matter, the danger and force of the material under the defendant's charge." *Hutchinson* v. *Boston Gas Light Co.* 122 Mass. 219, 222.

On each landing there was an electric signal button, connecting with a gong five inches in diameter, which was at the elevator well on the second story. The employee Hawkes testified that he came to the third floor for the purpose of getting some stock. Securing it, he went to the elevator and there "received information which led him to suppose" the elevator was in running order. This information was received from Muse, a fellow employee. Muse, standing near the push button for the bell, was seen by Hawkes to put his hand upon the button, as though to ring the bell. Hawkes then pulled the rope, the elevator started and the plaintiff's intestate was injured. Hawkes admitted that he did not hear the gong sound and there was other evidence

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showing that, while the gong was in proper working condition at the time, it did not sound.

It was for the jury to pass on the neglect of Muse in failing to sound the gong and in giving the information that it was safe to run the elevator; and it was for the jury also to pass on the negligence of Hawkes in starting the elevator without sounding the gong; and the negligence of either one or both would be the negligence of the defendant.

The defendant's bill of exceptions shows that the jury viewed the premises and "with the assent of both counsel" the elevator was operated, the locking device inspected and the gong rung. There was evidence that at the time of the injury to the deceased the elevator was in the same condition as when viewed by the jury. The bill of exceptions states that the "reference to the view is made a part of the record against the objection of the defendant who excepts thereto." As to this exception it is enough to say that the defendant, having accepted and presented this bill of exceptions, cannot now be heard to question their accuracy. Moreover, there is nothing to indicate any harm to the defendant in this respect if the point be regarded as open. *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, 503. *Rigg* v. *Boston, Revere Beach, & Lynn Railroad*, 158 Mass. 309, 313.

Exceptions overruled.

H. S. Avery, for the defendant.

G. M. Poland & L. P. Jordan, for the plaintiff, were not called upon.

ATTORNEY GENERAL *vs.* CATHERINE A. LAYCOCK, administratrix.

Suffolk. March 3, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions. *Judgment.*

At the trial of an information in equity brought by the Attorney General at the relation of the Treasurer and Receiver General under St. 1909, c. 266, § 1, and St. 1909, c. 490, Part IV, §§ 19, 20, against an administrator to recover a succession tax, where it appears that the tax commissioner determined

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the value of the estate to be a little over $1,000 and determined that an inheritance tax in a sum named was due to the Commonwealth and notified the defendant of such determination and that no proceedings had been taken under § 19 to reduce such valuation, although such determination of the valuation of the estate is final, the defendant may show that the payment by him as administrator of just debts of his intestate reduced the total assets of the estate to a sum less than $1,000 and that therefore under § 1 no tax is due to the Commonwealth.

Whether in such a suit a decree of the Probate Court allowing the account of the defendant as administrator in which the payments of the debts of his intestate were stated, the decree having been entered without any notice to the Commonwealth, is binding upon the Attorney General, it here was unnecessary to determine, because the amount of the payments made by the defendant as administrator was not in dispute.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on June 1, 1914, by the Attorney General at the relation of the Treasurer and Receiver General, against the administratrix of the estate of Mary G. Clines, late of Lawrence, who died on February 28, 1909, to recover $32.82, which was determined by the tax commissioner to be due upon the estate of the intestate as a succession tax under St. 1907, c. 563, as codified in St. 1909, c. 490, Part IV.

In her answer the defendant alleged that the estate of her intestate had consisted wholly of money appraised at $1,094.15, that the defendant as administratrix had used of the assets of the estate for the payment of debts about $310, leaving a balance for distribution of about $784.15, which was accounted for by the defendant and had been allowed by the Probate Court for the county of Essex, and that, such balance for distribution being less than the sum of $1,000, under St. 1909, c. 490, Part IV, § 1, no tax was due to the Commonwealth.

The case was submitted on an agreed statement of facts, containing the facts which are stated in the opinion, to *Hammond*, J., who found the facts to be as stated and at the request of the parties reported the case to the full court for determination. If the court should find that the entire estate of $1,094.15 was subject to an inheritance tax a decree was to issue as prayed for in the information; otherwise, the information was to be dismissed with costs.

A. E. Seagrave, Assistant Attorney General, for the plaintiff.

N. P. Frye, for the defendant.

RUGG, C. J. The facts material to this decision are that Mary G. Clines died intestate in February, 1909, and the defendant was

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appointed administratrix of her estate in the following May. She filed an inventory showing that the entire estate consisted of $1,094.15 in money. On January 19, 1911, the tax commissioner, in execution of the power conferred by the tax act, St. 1909, c. 490, Part IV, § 19, determined the value of this property to be $1,094.15, and gave due notice. On September 11, 1912, no account then having been allowed, he determined the amount of the collateral inheritance tax due to be $32.82, this sum being based on a valuation of $1,094.15 as the amount to be taxed and certified the amount, all as required by § 20, Part IV, of the act. On October 24, 1912, final account of the administration of the estate was filed and was allowed by the Probate Court, without notice to the Treasurer and Receiver General, showing disbursements of over $300, and a distributive share due to the administratrix of $784.15. If it is permissible to show these facts, the estate falls in value below the amount on which a tax is payable.

The question is whether the determination of the tax commissioner is final, or whether the defendant can show the facts and thus be exonerated from any tax. The answer depends upon the construction of St. 1909, c. 266, § 1, and St. 1909, c. 490, Part IV, §§ 19, 20. The former section enacts that in any proceeding like the present one for the recovery of taxes on legacies and successions, the administrator "may show . . . any facts which would entitle him to an abatement under the provisions" of § 20; while under the latter section he is entitled to an abatement if the Probate Court "adjudges that said tax or any part thereof was wrongly exacted." The petition for abatement must be filed "within one year after the payment of any tax to the Treasurer and Receiver General." When there has been no payment, the time limited for bringing the petition for abatemant has not begun to run. All the facts tending to show that no tax rightly could have been assessed may be presented on such a petition. When the statute expressly provides that in a proceeding like the present one any fact may be shown which would entitle the administrator to an abatement, it must follow that he stands in the same position with reference to proof of facts and relief to be afforded as if he were petitioning for an abatement.

St. 1909, c. 490, Part IV, § 4, as amended by St. 1909, c. 527, § 2, enacts that succession taxes shall be payable at the expiration of

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two years after the date of the giving of the bond by the administrator or executor. But that is not inconsistent with an abatement either by a direct proceeding or as a defence to an action for the collection of the tax. Indeed, most abatement proceedings must be instituted after the tax has become payable.

It has not been argued that the facts are not as shown by the account. It is unnecessary to determine whether the decree of the Probate Court allowing the final account of the administratrix, entered without notice to the Commonwealth, is binding upon the Attorney General or not. See *Attorney General* v. *Stone*, 209 Mass. 186. The facts as to the payment of just debts may be shown in this proceeding outside the account.

The contention of the Attorney General that the determination of the tax commissioner under the circumstances here disclosed is final under § 19 cannot be supported. That section provides that the valuation of the estate made by the tax commissioner shall be final unless revised in the way there pointed out. But the amount of the tax does not necessarily follow the valuation. From the valuation as thus determined there should be deducted the just debts and charges of administration before the balance is found on which the tax is to be assessed. *Callahan* v. *Woodbridge*, 171 Mass. 595, 599. There is nothing in the statute which prevents the amount of these from being shown in this proceeding.

The case at bar is quite different from *Attorney General* v. *Skehill*, 217 Mass. 364, upon which the Attorney General relies. There the attempt was to show that the valuation of the estate made by the tax commissioner was erroneous. By the terms of the statute that is final unless revised, as provided in the statute. But here there is no doubt about the valuation of the estate. That is not contested by the defendant. She simply wants to show that so much of the estate was paid out in debts that the balance was too small to be taxed. She would have a right to show that, if she had paid the tax and were seeking to recover it back by abatement proceedings. She has the same right when the information is brought by the Attorney General.

Information dismissed with costs.

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WILLIAM C. GARDNER *vs.* CITY OF LOWELL.

Middlesex. March 4, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Civil Service. Election. Lowell. Words, "Office," "Charges," "Reasons."

The provision of St. 1911, c. 624, that every person "appointed to an office classified under the civil service rules of the Commonwealth," with certain exceptions, "who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other," after a public hearing under St. 1904, c. 314, § 2, may file a petition for a review in the police, district or municipal court in the judicial district where he resides, whereupon "the decision of said police, district or municipal court shall be final and conclusive upon the parties," applies to all persons holding positions classified under the civil service as offices, and therefore clearly includes the indefinite suspension by the commissioner of streets and highways of Lowell of a foreman of laborers in the street department of that city, the position of such a foreman being so classified.

The reason assigned for the indefinite suspension of such a foreman, that the position held by him was not necessary and that in a more economical administration of the departments its duties could be transferred to others, is a "just cause" for removal or suspension within the contemplation of St. 1904, c. 314.

Where a foreman suspended for this cause filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing that court affirmed the order of the commissioner, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision, and, in an action afterwards brought by him against the city, cannot be allowed to show that he was suspended by the commissioner not in good faith on the ground of economy but from political and personal motives, the good faith of the commissioner in alleging the ground of suspension being a matter of fact determined by the decision of the police court.

Under the provisions of the charter of the city of Lowell contained in St. 1911, c. 645, §§ 22, 38, 41, and under R. L. c. 35, § 11, the commissioner of streets and highways of that city properly may keep in the safe in his office a copy of the papers relating to the removal or suspension of a subordinate in his department, and also properly may cause such papers temporarily to be removed to a police court for the purposes of the hearing of a petition of such subordinate under St. 1911, c. 624, for a review of the order for his removal or suspension, these acts of the commissioner showing not a violation of but a compliance with the requirement of St. 1904, c. 314, § 2, that in case of such a suspension or removal "a copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record."

CONTRACT against the city of Lowell to recover the amount of money that the plaintiff would have earned as a foreman of laborers of the street department of the defendant from July 21,

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1914, to the date of the writ, if he had not been suspended from his position in the manner stated in the opinion. Writ dated July 21, 1914.

In the Superior Court the case was tried before *McLaughlin*, J. The evidence offered by the plaintiff and excluded by the judge is described in the opinion. The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

St. 1904, c. 314, entitled "An Act to regulate removals and suspensions from office and employment in the classified civil service," is as follows:

"Section 1. Every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other except for just cause and for reasons specifically given in writing.

"Section 2. The person sought to be removed, suspended, lowered or transferred shall be notified of the proposed action and shall be furnished with a copy of the reasons required to be given by section one, and shall, if he so requests in writing, be given a public hearing, and be allowed to answer the charges preferred against him either personally or by counsel. A copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record."

St. 1911, c. 624, entitled "An Act relative to removals, suspensions and transfers in the civil service," is as follows:

"Section 1. Every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, except members of the police department of the city of Boston, of the police department of the metropolitan park commission, and except members of the district police, whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may, after a public hearing, as provided for by section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, as amended by chapter two

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hundred and forty-three of the acts of the year nineteen hundred and five, and within ten days after such hearing, bring a petition in the police, district or municipal court within the judicial district where such person resides, addressed to the justice of the court and praying that the action of the officer or board in removing, suspending, lowering or transferring him may be reviewed by the court, and after such notice to such officer or board as the court may think necessary, it shall review the action of said officer or board, and hear the witnesses, and shall affirm said order unless it shall appear that said order was made by said officer or board without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated in his office. The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties.

"Section 2. This act shall take effect upon its passage."

S. E. Qua, (*F. M. Qua* with him,) for the plaintiff.

W. D. Regan, for the defendant.

RUGG, C. J. The plaintiff seeks to recover from the defendant in an action of contract for alleged services rendered after January 5, 1914. Theretofore the plaintiff was foreman of laborers in the street department of the defendant. On that day one Morse, as commissioner of streets and highways, took charge of that department and gave notice to the plaintiff of his intent to suspend him indefinitely on the ground that the position held by him was not necessary and that in a more economical administration of the department its duties could be transferred to others, and that he was entitled to a hearing in accordance with St. 1904, c. 314, § 2, as amended by St. 1905, c. 243. The plaintiff requested a hearing, which was had before Morse on January 14, 1914, and he was indefinitely suspended. Thereafter the plaintiff filed a petition in the Police Court of Lowell under St. 1911, c. 624, for a review of the action of Morse in suspending him, and after a hearing that court affirmed the order of the commissioner. At the trial of this action in the Superior Court, the plaintiff offered to show that he was not removed in good faith on the ground of economy but from political and personal motives. This and other evidence later to be narrated was excluded and it was ruled that the proceedings in the Police Court constituted a defence. A verdict for the defendant was ordered. Exceptions to these rulings bring the case here.

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1. The plaintiff contends that St. 1911, c. 624, does not apply to his removal because, as he contends, he held no public office and that statute relates only to officers. This contention cannot be supported. That statute enacts that every person "appointed to an office classified under the civil service rules of the Commonwealth," with exceptions not here material, "who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other," may have a hearing. The meaning of this provision, although not expressed with the utmost clearness, is not difficult to determine. It is not confined in its operation to those who hold office as distinguished from employment, but it includes all those who hold positions classified under the civil service as officers. This is the natural import of the words used. The use of "employment" in connection with "office" in the latter part of the clause above quoted confirms the view that the classification as office or otherwise under the civil service rules is the decisive test. The distinction between an office and an employment as matter of law is often a difficult one to make, and may depend upon circumstances of some nicety. The classification in the civil service, while perhaps not always legally accurate, usually is certain and easy of ascertainment. By resort to it as a standard, there commonly would be no doubt as to the course to be followed. It is plain in the case at bar that the position held by the plaintiff was classified in "The official service." Hence he had a right to a hearing under St. 1911, c. 624.

2. This is the kind of a cause for removal or suspension which is comprehended within St. 1904, c. 314. The person affected is entitled to be given a copy of the "reasons" specifically setting out a "just cause" for his removal. "Charges" as used in § 2 of that act includes not only the specifications of inefficiency or misconduct, if any, which may be the basis of the action complained of, but also other "reasons" which may not involve any criticism of the person removed or suspended. A judicial review both of the fact and the good faith of the officer or board, where the reason alleged is the abolition of an unnecessary position, may be a most important protection to the tenure and efficiency of the civil service.

3. Having exercised his right to have the action of Morse re-

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viewed by the court, the plaintiff has elected to accept the relief afforded thereby. The final clause of § 1 of St. 1911, c. 624, is, "The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties." The correctness of the conclusion of the Police Court of Lowell, as to all matters rightly in issue before it, is not open to review in this action. *Barnes* v. *Mayor of Chicopee*, 213 Mass. 1.

4. The good faith of Morse in alleging that the suspension was made on the ground of economy and because the department did not require the services of a foreman, was a fact to be determined by the Police Court and is not subject to review in this action. The abolition of an unnecessary position made in good faith plainly is the duty of an executive or administrative officer. One holding such a position, though efficient in the performance of his duties, may be removed simply because the position is no longer necessary, provided the removal is made in good faith, and the recital of that reason is not made the cover for some other unjustifiable motive. *Garvey* v. *Lowell*, 199 Mass. 47, 49.

5. The plaintiff offered to show that soon after his suspension an unattested copy of the papers connected with his removal or suspension was placed in a safe in the office of the department of streets and highways and kept there until a short time before the hearing in the Police Court, when they were removed. A brief memorandum of the steps in the matter also was kept there. But no copies were filed with the city clerk. This evidence was excluded. It is contended it was admissible as showing a failure to conform to the requirement of the statute to the effect that "a copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record." St. 1904, c. 314, § 2, as amended by St. 1905, c. 243. The proffered evidence showed a compliance with the statute. Under the city charter of Lowell, St. 1911, c. 645, the department of streets and highways is one of the five departments into which the administration of all the affairs of the city is divided. § 38. Morse as commissioner was in charge of that department. § 22. He was the administrative head of the department and had general power to "suspend, remove, or discharge all subordinate officers and employees" in that department. § 41. He therefore

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was the "sole officer in charge of a department," under R. L. c. 35, § 11, and charged with the custody of "any public records in such department." The removal or discharge of a subordinate, since it must be a matter of public record, was in that department. The method of keeping it was not illegal as shown by the proffer of evidence. There was nothing to show that the removal of the copies from the safe was anything more than temporary or incidental to the judicial inquiry. No harm was done by the exclusion of the evidence. It is not necessary to consider whether it also rightly was excluded on other grounds.

Exceptions overruled.

FRANCIS C. WELCH & another, trustees, *vs.* CITY OF BOSTON.

Suffolk. March 5, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Tax, On intangible property held by trustees. *Trust*, Taxation.

Under St. 1909, c. 490, Part I, § 23, cl. 5, bonds and shares of corporate stock, the legal title to which is in trustees residing in this Commonwealth, where all the beneficiaries of the trust reside out of the Commonwealth, must be assessed for taxation to such trustees, although the bonds and the certificates of stock are deposited and kept in another State and the trustees were appointed by a probate court of such other State.

In the present case it was unnecessary to consider what would have been the effect of a statute of the State where the evidences of the intangible property were deposited and kept undertaking to establish by law a *situs* in that State for all intangible property held by trustees appointed by its courts.

It also was unnecessary to consider what the decision of this court would have been if the property assessed here for taxation had been part of an estate in process of settlement and distribution in the courts of another State.

CONTRACT by the trustees under the will of Marianne H. Dwight, who died on August 31, 1912, at York in the State of Maine, being a resident of that State, against the city of Boston, for $210, the amount of a tax paid by the plaintiffs under protest on January 18, 1915, with interest thereon from that date. Writ dated January 18, 1915.

In the Superior Court the case was submitted to *King*, J.,

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upon an agreed statement of facts, the essential part of which is stated in the opinion. The judge found the facts to be as stated, and at the request of both parties reported the case for determination by this court. If the plaintiffs were entitled to recover, judgment was to be entered for them in the sum of $210 and interest from January 18, 1915; otherwise, judgment was to be entered for the defendant.

The material part of St. 1909, c. 490, Part I, § 23, is as follows:

"All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of May. . . . Fifth, Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the Commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other State."

B. Corneau, for the plaintiffs.

J. P. Lyons, for the defendant.

RUGG, C. J. This is an action to recover a tax paid under protest. The plaintiffs are trustees appointed by the Probate Court of York County in the State of Maine, under the will of a testatrix who at the time of her decease was and for a long time previous thereto had been domiciled in that county and State. All the beneficiaries under the trust are domiciled in the State of California. The *corpus* of the trust fund, so far as concerns the tax here in question, consists entirely of stocks and bonds of corporations foreign to this Commonwealth. These bonds and certificates of stock always have been deposited and kept in the State of Maine. The question is whether such property is legally assessable to the plaintiffs who are domiciled in this Commonwealth.

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It is to be noted that the personal property here sought to be taxed does not belong to the estate of a decedent in process of settlement. The plaintiffs do not hold as executors or administrators, but as trustees. It must be presumed that, at least so far as relates to the personal property held by the plaintiffs, the estate of the testatrix has been distributed and a legacy has been paid to them as trustees. It does not appear that the property has been taxed either at the domicil of the beneficiary or in Maine, nor does it appear that there is any law permitting or requiring the taxation of the property in either of those jurisdictions. We are not concerned, therefore, with any questions touching double taxation, except so far as that may be involved in the interpretation of our own statute.

Manifestly the legal title to the stocks and bonds in question is in the plaintiffs. It is one of the fundamental characteristics of trusts that the full and exclusive legal title is vested in the trustee. *Gray* v. *Lenox*, 215 Mass. 598. The rights of the beneficiary are purely equitable and cannot be enforced ordinarily at law, but are cognizable only in equity. Our tax law proceeds upon the basis that in all instances where the trustee is a resident of this Commonwealth he is the person to whom the assessment must be made. That is on the ground that he is the owner in the legal sense. The opening words of the controlling section of the statute render liable to taxation all personal property owned by inhabitants of the Commonwealth whether within or without the Commonwealth, unless by reason of some special exemption. *Putnam* v. *Middleborough*, 209 Mass. 456. That it was the legislative intention to tax property of this character is manifest from St. 1909, c. 516, section one of which exempts from taxation "merchandise machinery and animals owned by inhabitants of this Commonwealth but situated in another State," and § 2 of which subjects to taxation in the city or town where they are situated like personal estate owned by non-residents. The property in question is owned by inhabitants of this Commonwealth, although physically it is not kept within the State. But it is intangible in its character. It is quite different in nature from coal or cars or other corporeal property which, for purposes of taxation, by reason of its substantial body may acquire a *situs* of its own apart from the domicil of its owner. *Union Refrigerator Transit Co.* v. *Kentucky*,

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199 U. S. 194. While for some purposes bonds, being specialties, have a *situs* where they are found, *Callahan* v. *Woodbridge*, 171 Mass. 595, *Wheeler* v. *New York*, 233 U. S. 434, yet commonly they are held to be located at the domicil of their owner. *Frothingham* v. *Shaw*, 175 Mass. 59. Bonds are but a species of indebtedness and wherever actually held or deposited "may for purposes of taxation, if not for all others, be regarded as situated at the domicil of the creditor" or owner. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498. Certificates of stock, apart from express statute, have never been regarded as capable of acquiring a *situs* independent of the domicil of the owner and of the corporation whose fractional ownership they represent. *Kennedy* v. *Hodges*, 215 Mass. 112. Both bonds and stocks are in their nature difficult of discovery. They can be kept in small compass and are not likely to be observed. They are called intangible property. The maxim that they follow the person of their owner as to *situs* has its foundation not only in convenience but in the practical necessities of business. That maxim is recognized generally as applicable to such securities as here are in question, in the absence of some special provision. *Covington* v. *First National Bank of Covington*, 198 U. S. 100, 111. *Hawley* v. *Malden*, 232 U. S. 1, 12.

The *situs* of such intangible securities for purposes of taxation commonly is treated as at the domicil of the owner. "Generally speaking, intangible property . . . may be regarded, for the purposes of taxation, as situated at the domicil of the creditor [owner] and within the jurisdiction of the State where he has such domicil." A tax upon such property to the owner at his domicil, in accordance with the State statute, "violates no provision of the Federal Constitution." *Buck* v. *Beach*, 206 U. S. 392, 401. Even in the light of the most recent decisions domicil of the owner usually fixes the *situs* of personal property, for purposes of taxation, even as to classes described as tangible, unless it has become permanently located in some other jurisdiction and, so far as adjudications go, is also employed in the prosecution of business there. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 74. See 15 Columbia Law Review, 377.

Upon this aspect of the case the contention of the plaintiffs is that the owners of stocks and bonds may establish an independent *situs* for the purpose of their taxation, different from the

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domicil of the owner, the debtor or the corporation issuing the stock, by a simple deposit of them in a foreign State, and thereby divest the jurisdiction of their domicil of the right to tax. Without undertaking to say what effect such deposit may have on the taxing power of the State of deposit, see *Wheeler* v. *New York*, 233 U. S. 434, 439, 446, it seems to us that the power of the State of their domicil to tax such property is not affected.

If it be said that governmental protection is the consideration for taxation, *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 90, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 202, there is still support for the tax. The plaintiffs would be given whatever protection they as owners might require from our government, and they doubtless could be held by our courts to the performance of their trusts at the suit of their *cestui qui trustent* or other interested parties.

The terms of cl. 5 of § 23 of our tax law are explicit to the effect that a resident trustee shall be assessed in the place where he resides when the income of the trust is payable to a non-resident. These words include a case like the present. There is no indication of a legislative purpose to restrict the operation of the tax law to instances where the trust had its origin within the State. It is the title to property alone which is made the test of liability to the tax. There is no manifestation of a design to exclude from taxation intangible personal estate received by trustees under the terms of a foreign will or other foreign instrument. The final sentence of the section exempting from taxation to domestic beneficiaries property on which a tax has been paid in another jurisdiction by foreign trustees, discloses a purpose not to impose in that instance double taxation.

It is urged that, because the plaintiffs owe their appointment to a foreign court, they cannot be taxed here. But there is nothing to indicate that the trust fund held by the trustees is regarded as in the custody of that foreign court, or to show that the usual incidents of complete legal title did not follow the transfer of this intangible personal property to the trustees.

It does not appear on this record and it cannot be presumed in the absence of evidence that there is any provision in the law of Maine which undertakes to establish for shares of stock and bonds passing under the will of a deceased resident to non-resident trus-

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tees a *situs* in that State for purposes of taxation. See *Augusta* v. *Kimball*, 91 Maine, 605. Nor is it necessary to consider what extraterritorial effect such law, if it existed, would have.

Strong practical considerations lead to the same result. We know of no general principle of jurisprudence which apart from statute fixes the *situs* of a trust fund in the jurisdiction of the court which appoints a non-resident trustee to execute the terms of the trust. There is no way, so far as this record shows, in which the taxing power of Maine in this case can ascertain the items of the trust investment, in order to determine the amount there subject to taxation. There is or may be no method of making service upon a non-resident trustee or exercising any compulsion to make the *corpus* of the fund contribute to the support of government. Without undertaking to say what the law of this Commonwealth now is, it seems plain that before the enactment of St. 1889, c. 462, requiring the appointment of a resident agent, there were no direct means of reaching such non-resident trustee appointed by our courts. The natural method of dealing with the taxation of invisible and intangible property is to treat with the owner where he lives, where he can be reached and where it is comparatively easy to administer the law with justice. Any other course seems to open wide the door to evasion of all taxation.

Different questions would be presented if it appeared that the State of Maine had established by law a *situs* in that State for all intangible personal property held by trustees appointed by its courts, or that the property was part of an estate in process of settlement and distribution by the courts of a foreign State, upon which no opinion is expressed. In the case at bar the owners of the legal title to intangible personal property are residents of this Commonwealth and are made subject to taxation by the clear terms of our tax law. They have chosen, for reasons of their own, to cause the evidences of title to such intangible property to be deposited in a foreign jurisdiction. But that circumstance is not enough to divest this State of the power to tax. No reason appears why, on legal grounds or even on equitable considerations, they are entitled to a relaxation of a settled rule of law as to the *situs* of intangible personal property.

For these reasons no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by

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our own Constitution is violated by the statute as thus interpreted. This conclusion is supported in principle by *Kirtland* v. *Hotchkiss*, 100 U. S. 491, *State Tax on Foreign-held Bonds*, 15 Wall. 300, *Buck* v. *Beach*, 206 U. S. 392, 401, *Augusta* v. *Kimball*, 91 Maine, 605, *Ailman* v. *Honey*, 17 R. I. 362, *People* v. *Feitner*, 168 N. Y. 441, *Mackay* v. *San Francisco*, 128 Cal. 678. See *Hemenway* v. *Milton*, 217 Mass. 230. It is contrary to *Goodsite* v. *Lane*, 72 C. C. A. 281, which, for the reasons stated, we are constrained not to follow.

Judgment for the defendant.

JOHN H. STEVENSON *vs.* EDWARD C. DONNELLY.

Suffolk. March 8, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Police, District and Municipal Courts, Appeal. *Practice, Civil*, Appeal. *Lord's Day. Time. Landlord and Tenant*, Existence of relation. *Contract*, What constitutes. *Fence. Words*, "Within six days," "Days."

Where a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited is less than a week, Sunday is excluded.

In computing the "six days after the entry of the judgment" within which, by the provisions of R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, a person aggrieved by a judgment of a municipal court in a civil action may appeal to the Superior Court, Sunday is excluded.

In the same statute, the word "days" means entire days, and an appeal perfected at any time during the sixth day, exclusive of Sunday, although not within the sixth secular period of twenty-four hours, is effectual.

In an action for use and occupation of a fence upon land of the plaintiff for bill posting purposes, if there is no evidence as to any talk between the plaintiff and the defendant as to the use of the fence by the defendant, and if the evidence tends merely to show that the defendant made a contract for the use of the fence with a person who had no authority to make such a contract on the plaintiff's behalf, and that, as soon as the defendant was notified by the plaintiff that the plaintiff would claim compensation for the use of the fence, he ceased using it, a finding for the plaintiff is not warranted.

Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, is a tenant or licensee, here was not passed upon, because such use of the fence was without authority from the landowner and was under no agreement authorized by him.

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CONTRACT for use and occupation of premises of the plaintiff "for billboard purposes." Writ in the Municipal Court of the City of Boston dated December 3, 1910.

Judgment was entered for the defendant in the Municipal Court and an appeal was claimed by the plaintiff under the circumstances stated in the opinion.

Upon the entry of the appeal in the Superior Court, the defendant filed a motion that the case be dismissed because the appeal was not taken and perfected within the time provided by the statute. The motion was heard and was denied by *Jenney*, J. The defendant appealed and the judge, after the trial of the case in the Superior Court and the allowance of exceptions of the defendant saved at the trial, reported the case for determination by this court as to the correctness of his ruling.

The case was tried before *Hitchcock*, J. The material evidence is described in the opinion. At the close of the evidence the defendant asked for the following rulings, among others:

"1. On all the evidence and the pleadings the plaintiff is not entitled to recover and your verdict must be for the defendant."

"6. On all the evidence the relation of landlord and tenant did not exist between the plaintiff and the defendant."

The rulings were refused. The jury found for the plaintiff in the sum of $364.10; and the defendant alleged exceptions.

J. M. Maloney, for the defendant.

J. F. Daly, for the plaintiff.

RUGG, C. J. This is an action begun in the Municipal Court of the City of Boston, where judgment was entered in favor of the defendant. A doubt is raised as to the jurisdiction of the Superior Court founded on the ground that the appeal from the judgment of the Municipal Court was not seasonably prosecuted. That judgment was entered at ten o'clock in the forenoon of Friday, the third day of February, 1911, the hour and day of the week required by R. L. c. 177, § 2. The appeal was perfected at 11.15 o'clock in the forenoon of February 10, which was the seventh day counting Sunday, and the sixth day excluding Sunday, after the entry of the judgment. It is provided by R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, that "a party who is aggrieved by the judgment of a . . . municipal court . . . in a civil action . . . [with exceptions not here material] . . . may . . . within

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six days after the entry of the judgment, appeal therefrom to the Superior Court." The time provided for the filing of the appeal bond by the two following sections is "within six days after the entry of the judgment." The first point to be determined is whether Sunday is excluded from or included within the six day period limited by the statute. It was said in *Cunningham* v. *Mahan*, 112 Mass. 58, at page 59, "When a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited exceeds a week, Sunday is included in the computation; but if it is less than a week, Sunday is excluded. This is the established rule of interpretation in this State." This statement of the law has been approved in *Haley* v. *Young*, 134 Mass. 364, *Cowley* v. *McLaughlin*, 141 Mass. 181, and *Tuttle* v. *Boston*, 215 Mass. 57, 60. It was a renewed declaration of the law of earlier cases. In *Cooley* v. *Cook*, 125 Mass. 406, where the question related to a period of four months, it was said, "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest." If that test be applied literally to the instant statute, the appeal would not be seasonable, for the reason that a Sunday must always be included in a period of six days beginning on Friday, or possibly on Thursday. R. L. c. 177, § 2. The statement of the law in *Cooley* v. *Cook*, was not phrased with a view to any such question as is here presented, but with reference to the computation of a period within which several Sundays of necessity would be included. That case discloses no purpose to change the rule stated in *Cunningham* v. *Mahan*. It is a simple rule, easy of application and as free from the possibility of misapprehension or mistake as any such rule well can be, to hold that in computing any period of time less than a week, Sunday is to be excluded; and that in computing any period of time of a week or more, Sunday is to be included. This is the law as it has been commonly understood and practiced in this Commonwealth for many years. It is a good practical rule. There is no reason disclosed on this record why it should not be applied in the case at bar.

Although in this instance the effect of the statute in prescrib-

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ing six days is the same as if a period of seven days had been limited, that is a mere accident and does not affect the soundness of the rule. As Sunday is to be excluded in reckoning the period, the appeal was perfected on the sixth secular day after the judgment of the Municipal Court.

As the appeal was not perfected until after eleven o'clock on the sixth day after the entry of judgment, the further question arises whether the period limited includes entire days or only a period of six times twenty-four hours measured on secular days from ten o'clock in the forenoon, the hour when the judgment is entered. It has been said, "The law knows no division of a day." *Portland Bank* v. *Maine Bank*, 11 Mass. 204. That is by no means a hard and fast rule and fractions of a day will be regarded when it is necessary in order to do justice between the parties. *Finneran* v. *Graham*, 198 Mass. 385. *Munns* v. *American Agricultural & Chemical Co.* 216 Mass. 423. Nevertheless, that fractions of a day will not be considered and the word "day" or "days" ordinarily will be construed to mean a whole day, is a convenient general statement to apply when there is nothing in the particular circumstances to indicate that some other meaning was intended by the parties or by the Legislature. It perhaps would be possible to say that, inasmuch as R. L. c. 173, §§ 97, 98 and 99, required the appeal to be perfected within twenty-four hours after the entry of the judgment, and this was extended by St. 1910, c. 534, § 1, to six days, a projection of the exact hour of the first day permitted by the earlier statute to the same hour of the sixth day was intended by the amendment. See *Cornfoot* v. *Royal Exchange Assurance Corp.* [1904] 1 K. B. 40. But there is nothing to show that in enacting the amendment "days" was used in any other than its ordinary sense of entire days. It seems more consonant with the general purpose of the amending act to define the word "days" in the same sense in which it commonly is used in statutes. As a practical working rule, apart from definition of the words of the statute, this seems quite as sound as the other would be. It is in accord with the construction usually given to the word. *Wiggin* v. *Peters*, 1 Met. 127, 129. *Clark* v. *Flagg*, 11 Cush. 539, 541. *Bigelow* v. *Willson*, 1 Pick. 485, 494. *In re North*, [1895] 2 Q. B. 264. It follows that the appeal was entered seasonably and that the Superior Court had jurisdiction.

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The action is for the recovery of rent for the use of a fence on land of the plaintiff by the defendant for advertising purposes. The only occupation which the plaintiff claimed had been made by the defendant was by posting bills on the street side of the fence. The plaintiff and the defendant never had any talk respecting its use. After it had been so used by the defendant for many years, the plaintiff by letters notified the defendant that he should claim compensation, and thereafter the defendant made no use of the fence. The uncontradicted evidence tended to show that the defendant made a contract with one Dodge for the use of the fence for advertising purposes, and compensated Dodge according to their contract up to the time of the letter of the plaintiff to the defendant, and that Dodge had no authority to act for the plaintiff in the matter. Under these circumstances there was no evidence warranting a recovery by the plaintiff in this form of action. It was said in *Central Mills Co.* v. *Hart*, 124 Mass. 123, at page 125, "In order to maintain assumpsit for the use and occupation of land, something in the nature of a demise must be shown, or some evidence given to establish the relation of a landlord and tenant. That relation can only grow out of a contract, and it accordingly has been held that a contract, express or implied, is necessary in order to sustain assumpsit for use and occupation." According to this rule of law, there was no evidence of a contract between the plaintiff and the defendant. The defendant made a contract with another person, who did not in any respect represent the plaintiff. *Boston Ice Co.* v. *Potter*, 123 Mass. 28.

It is not necessary to consider whether the nature of the use made by the defendant of the fence for advertising purposes would have constituted him a tenant or a licensee, if his occupation had been by virtue of an arrangement with the plaintiff or some one representing him. See *Roberts* v. *Lynn Ice Co.* 187 Mass. 402; *Lowell* v. *Strahan*, 145 Mass. 1.

Order denying motion to dismiss affirmed.
Exceptions sustained.

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WARREN M. TAPLEY *vs.* THAYER-OSBORNE SHOE COMPANY & trustee.

Suffolk. March 8, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Construction, Performance and breach. *Custom. Practice, Civil*, Conduct of trial: rulings and instructions.

In an action by a shoe salesman against his employer for commissions alleged to be due to him under an agreement for employment during a certain year, the plaintiff claimed commissions for sales made during the year of goods, which the defendant did not deliver until after his employment had ceased, and introduced in evidence a custom of the trade supporting his claim. The defendant contended that, because of arrangements and contracts made between the parties in previous years, the custom did not apply. It was *held* that the questions in dispute were questions of fact for the jury; and, it appearing that the questions under correct instructions had been left to the jury, who found for the plaintiff, an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled.

CONTRACT for certain commissions alleged to be due to the plaintiff as a salesman for the defendant. Writ dated May 22, 1912.

The case was referred to Frank Paul, Esquire, as auditor, and afterwards was tried before *Keating*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant asked for rulings that the plaintiff was not entitled to recover on any count of his declaration, and for the following ruling:

"5. If the jury find that the one and one half per cent upon $45,802.16 worth of shipments which was admittedly received by the plaintiff between November 1, 1908, and May 1, 1909, said shipments resulting from the sale of samples prior to said November 1, 1908, was received by him and paid by the defendant under the contract as to remuneration then existing between the parties and that the plaintiff was entitled to receive such sum under said contract, then in as much as such method of remuneration was continued in force under the contract of November 1, 1910, which the plaintiff has declared upon, as a matter of law the custom upon

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which the plaintiff relies is not applicable and the plaintiff is not entitled to recover."

The rulings were refused. The jury found for the plaintiff in the sum of $2,557.06; and the defendant alleged exceptions.

A. T. Smith, for the defendant.

F. M. Copeland, for the plaintiff.

CARROLL, J. The plaintiff, while in the employ of the defendant as a travelling salesman, made an agreement beginning November 1, 1910, which ended November 1, 1911, by which he was to sell by sample to the jobbing trade within a designated territory the products of the defendant's shoe factory. The dispute between the parties is whether the plaintiff is entitled to recover a commission of one and one half per cent upon shipments made by the defendant from its factory, after the plaintiff had left its employ and between the months of November, 1911, and May, 1912. The defendant's contention was that it hired the plaintiff on a salary of one and one half per cent commission and that nothing was due him upon shipments, made after he ceased to work for the defendant and from orders taken on or before November 1, 1911, when he left its employment. The plaintiff contended that he was hired on the ordinary commission basis, that he was entitled to his commission on all shipments, made to his customers after the contract had ended upon orders taken while the contract was in force, and also upon shipments, made within his territory to his customers after November, 1911, and before May, 1912.

The case was tried before an auditor who reported in the plaintiff's favor and there was in evidence a custom of the shoe trade, that salesmen working on a commission basis were accustomed to receive the agreed commission on shipments made to their customers for the six months following the termination of the salesman's employment.

Twice in each year, generally in May and November, the plaintiff started on a trip, taking a line of samples, selling to the jobbing trade for the next season's trade. "Shipments to the jobbers, based upon these samples, sold in November to them would not commence until the following spring; perhaps March or April. The following May the plaintiff would go on a trip exactly like the November trip." In 1904, shortly after the defendant commenced business, the plaintiff entered its employ as

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a salesman for a commission of one and one half per cent on all deliveries, he being at this time its only salesman. He worked under this contract until August 1, 1906, when he ceased to work on a commission basis and began to receive a salary of $125 per month. This continued until November 1, 1908. Under this contract of 1906, no commissions were paid him upon shipments made during the first six months thereof, although deliveries were made during that time as a result of sales made by him prior thereto, while engaged in selling on a commission basis.

On November 1, 1908, another contract was made by which the plaintiff ceased to work on a salary and began again to work on a commission basis of one and one half per cent. The evidence for the defendant tended to show that he was hired on a salary basis of one and one half per cent based on monthly shipments. From November 1, 1908, and for six months following, the defendant paid the plaintiff on all the deliveries from its factory on sales made prior to that time by the plaintiff while he was working on a salary, as distinguished from a commission. The contract of 1908 was continued until November 1, 1910, when the contract in dispute was made. This contract was identical with the contract of 1908, except as to changes in territory.

The controversy which the jury had to pass upon was the contract of 1910, and not the contracts of 1904, 1906 or 1908. These previous contracts were admissible in evidence solely for the purpose of aiding the jury in determining what the plaintiff and the defendant agreed to in November, 1910.

In November, 1911, when the plaintiff ceased to work for the defendant, the plaintiff insisted that he was entitled to a commission on the shipments made during the six months following that November, and relied on the custom of the trade to pay such a commission. While it was agreed, or at least not disputed, that there was such a custom, it was in evidence that this custom did not apply when a salesman received some other return, either by way of salary or commission, during the first six months of his contract; that the reason for the custom of allowing commission payments for the six months following the termination of the contract was that during the first six months the agent was in receipt of no returns, and that the custom did not apply to the plaintiff's contract, because under the contract of 1908 and during its first six months,

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he received a commission on all shipments made during that period, although these shipments were to customers to whom he sold under the previous contract of 1906, when he was engaged for a monthly salary. To this the plaintiff answered; whatever payments were made to him during the contract of 1908 were not decisive under the contract in suit, and that one reason why these payments were made to him as above stated, was because at the conclusion of the contract of 1904, commissions were due him under the custom referred to, and they were not paid him; and the payments under the contract of 1908 were made him to make up for the loss of the commissions which were due and not paid him under the contract of 1904. All these questions were for the jury. The jury have passed upon them under correct instructions and we cannot say that the jury was wrong. The refusal of the defendant's requests was proper.

Exceptions overruled.

BESSIE O. HOWELL & another *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 9, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Damages, For property taken or impaired under statutory authority. *Grade Crossing. Railroad.*

A loss of view from certain land occasioned by the abolition of a certain crossing of a railroad with a highway at grade which resulted in bringing the railroad tracks, formerly two hundred feet distant, forty feet nearer to the land, in the construction of four tracks of the railroad instead of two, in the raising of an embankment sixteen and one half feet high so that its top was about on a level with the knob of the front door of a house on such land, and in the cutting off and obstruction of the owner's view of the highway and of a pond and the country nearby, is a damage too remote and speculative and not sufficiently distinct, separate, special and peculiar to warrant a recovery therefor under St. 1906, c. 463, Part I, § 37.

Whether under any circumstances there could be a recovery under that statute for loss of view, was not decided.

PETITION, filed on September 29, 1910, under St. 1906, c. 463, Part I, § 37, for the assessment of damages alleged to have been

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suffered by reason of the changes wrought in the abolition of the crossing at grade of the defendant's railroad with Mill Street in the part of Boston called Dorchester.

In the Superior Court the case was tried before *Fessenden*, J. The material facts are stated in the opinion. The jury found in substance that the only damage suffered by the petitioners was "by reason of effect on view," and found for the petitioners in the sum of $411.55. The respondent alleged exceptions.

J. L. Hall, (*S. C. Rand* with him,) for the respondent.

H. W. Packer, for the petitioners.

RUGG, C. J. The single question presented by these exceptions is whether the petitioners can recover damages for injury to the prospect from their land and dwelling by reason of the construction of a railroad embankment in connection with the abolition of a grade crossing.

The petitioners owned a parcel of land with a house and stable thereon situated on the easterly side of Mill Street in the Dorchester district of Boston. Westerly of Mill Street, on land somewhat lower in grade than the petitioners' land, ran the respondent's tracks, crossing Mill Street at grade about two hundred and thirty feet away, and being at its nearest point across Mill Street and the land of other owners about two hundred feet from the petitioners' estate. The Mill Street crossing at grade was eliminated by proceedings under the grade crossing abolition act. As a result, certain land of other persons about two hundred feet or more from that of the petitioners was taken, the railroad was elevated sixteen and one half feet at a point opposite the petitioners' estate, bringing the grade of the tracks about on a level with the knob of the petitioners' front door, four tracks were constructed in place of two, the nearest one being thirteen feet nearer to the petitioners' estate than either of the two existing before. Now the shortest distance between any part of the petitioners' land and the respondent's location is about one hundred and sixty feet. The abutments of the bridge on which the tracks were carried over Mill Street obstructed the view of that street from the petitioners' house, while the prospect in front is affected to the extent that a pond and other country nearby are cut off by the embankment.

It was held in *Hyde* v. *Fall River*, 189 Mass. 439, that a landowner might recover for damages suffered in consequence of changes in

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a street in connection with a grade crossing abolition which were special and peculiar to him as distinguished from injuries sustained by him in common with the public at large, even though no part of his land were taken, thus overruling *Rand* v. *Boston*, 164 Mass. 354. In *McKeon* v. *New England Railroad*, 199 Mass. 292, it was determined that there could be no recovery where no land or easement in land had been taken from anybody. In the light of these decisions, the precise point now presented is, whether it can be said as matter of law that damage to these petitioners is too remote, speculative or intangible to be recoverable under the statute.

The essential words of the governing statute, which in this respect have not been changed since R. L. c. 111, § 153, are in St. 1906, c. 463, Part I, § 37, as follows:

"All damages which may be sustained by any person in his property by the taking of land for or by the alterations of the grade of a public way, or by an abutter thereon by the discontinuance of such public way, to the same extent as damages are recoverable by abutters on ways discontinued by towns, or by the taking of an easement in land adjoining a public way, shall primarily be paid by the city or town; and all damages which may be caused by the taking of land for the railroad or by the change or discontinuance of a private way, or by the taking of an easement in land adjoining a private way or a railroad location in connection with the abolition of a grade crossing shall primarily be paid by the railroad corporation; and all damages which may be sustained by any person by the abolition of private ways, except as hereinbefore provided, shall be entirely paid by the railroad corporation."

The precise effect of the decision of *Hyde* v. *Fall River*, 189 Mass. 439, in connection with *Rand* v. *Boston*, 164 Mass. 354, relates to the interpretation of the statute as to the extent of damages recoverable under the grade crossing abolition act. It was said by Holmes, J., speaking for the majority of the court in *Rand* v. *Boston*, that "The question is simply one of construction. The operative words here are narrower than those just quoted from the Public Statutes as to ways and sewers, [c. 49, § 16, now R. L. c. 48, § 15, 'regard shall be had to all the damages done to the party, whether by taking his property or injuring

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it in any manner'] or even those as to railroads, ('all damages occasioned by laying out, making, and maintaining its road,' Pub. Sts. c. 112, § 95)." The utmost scope of *Hyde* v. *Fall River* was to overrule this, which was the essence of the decision of *Rand* v. *Boston*, and to decide that the damage clause in the grade crossing abolition act was not narrower than that of the general highway law, but was the same in substance. There is no intimation anywhere in the opinion of *Hyde* v. *Fall River*, that it was intended to say that the effect of the damage clause was enlarged over that governing the case where land was taken for highway uses under the general law. The chain of reasoning of the opinion is to establish the same rule of damages to property arising from the laying out of highways in grade crossing abolition proceedings as that prevailing where land was taken for laying out a highway under the general law. But that decision went no further. There is no rational ground for contending that the language of the damage clause of the grade crossing act is broader than that of the general highway statute. This is so plain that it is not necessary to pause for amplification. There is nothing in the facts of *Hyde* v. *Fall River* to warrant any other conclusion. The abutters there were "left with a street nearly fifteen feet high and only forty feet away, built in front of their premises, over which teams are frequently passing." 189 Mass. 440. It was in effect the widening of the street by the addition on the opposite side of another level for travel. Manifestly under the general highway damage clause there were damages special and peculiar to the abutter on the other side of the street. Although *Hyde* v. *Fall River* related only to that part of the grade crossing abolition statute which expressed the right to damages arising from the construction of highways, the reasoning of the opinion requires that it be applied to damages arising from the construction of the railroad. But that decision has no greater effect in the one class of damages than in the other. The rule of damages was not enlarged nor magnified. It simply was restored as matter of statutory interpretation instead of being narrowed.

It follows that in assessing the damages occasioned by railroad constructions in connection with a grade crossing abolition, the rule of damages established by the general railroad law for assessing damages by the construction of railroads is to be followed.

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That rule is found in St. 1906, c. 463, Part II, § 83, in these words: "All damages caused by laying out, making and maintaining its railroad, or by taking land or materials therefor," shall be recovered. These are almost the identical words of similar statutes from the beginning, certainly the same in legal intendment, with reference to which all our decisions have been made as to the extent of damages recoverable for the laying out, construction and maintenance of railroads.

It has been settled by a long series of decisions that a landowner may recover compensation for actual and real damage to property arising from the laying out, construction or maintenance of a railroad, capable of being pointed out, described and appreciated, although no part of his land has been taken. *Dodge* v. *County Commissioners*, 3 Met. 380. *Ashby* v. *Eastern Railroad*, 5 Met. 368. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107, 113, 114. *Babcock* v. *Western Railroad*, 9 Met. 553, 555. *Brown* v. *Providence, Warren & Bristol Railroad*, 5 Gray, 35. *Curtis* v. *Eastern Railroad*, 14 Allen, 55. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180. *Whitney* v. *Commonwealth*, 190 Mass. 531, 533.

A review of some of our decisions in which claims for damages have been disposed of adversely will afford assistance in reaching a just conclusion respecting the petitioners' contentions. In *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1, a landowner sought damages for the depreciation of land which for the purposes of that case was ruled to be outside but adjoining the location of the railroad, arising from proximity to the railroad, such as for frightening horses and like causes, and the annoyance and inconvenience arising from the laying of the track and the frequent passing of trains; and it was said by Wells, J., "When the injury complained of consists only in annoyances, as by the 'frightening of horses and such like causes,' whether by crossing streets or passing near to private avenues or land, it is not such a direct and appreciable injury to the land or the landowner as to constitute, of itself, a ground for the recovery of damages; although it may make the land less desirable for some purposes, less saleable, and thus depreciate its market value." In *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10, it was said at page 15, respecting a landowner's claim of damages for depreciation arising from the proximity of the railroad and from the running of trains: "If

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the road had been constructed close to his land, but without taking any part of it, he would have had no right to recover for any depreciation in the value of his property by reason of the several causes" for which damages were sought. In *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185, the claim was made by a landowner that because of the laying out of a railroad not only was he entitled to recover damages occasioned to adjacent land, but also to other lots owned by him not far away. It was said respecting this contention: "We see nothing in the case to indicate that any special or peculiar damage was caused to any of the remaining lands of the petitioners, save the lots immediately adjoining the land taken, or upon the same street with the railroad. If the widening of the railroad and the laying of additional tracks, whether for traffic or to be used as a freight yard, made the village less desirable as a place of residence, because it was more difficult or dangerous to cross the tracks in passing from one locality to another, or because of increased noise or smoke, or because the tracks, or the cars which might be stored upon them, might be unsightly or displeasing, none of these circumstances would properly be elements of the damages to be awarded to lots no portion of which was taken, because they were general, affecting the whole village, and not special and peculiar to the lands of the petitioners. . . . Such considerations are to affect the damages to the residue of those lots parts of which are taken only so far as the railroad is brought nearer, and the inconvenience thus aggravated by its greater proximity due to the fact that part of the lots are taken." In *Davenport* v. *Hyde Park*, 178 Mass. 385, a claim was made for damages for loss of view, cut off by an embankment to support the highway, which as appears from an examination of the original papers began at its nearest point one hundred and thirty feet distant from the petitioner's lot and rose by a five per cent grade to a height of eighteen feet in the clear above the railroad tracks at an overhead bridge, whereas the street theretofore had been substantially level. Evidence was excluded as to the effect on the view of this embankment, and respecting an exception thereto it was said by Hammond, J.: "Manifestly the land was too far away to make that a practical question."

These decisions seem to be decisive against the petitioners' claim in the case at bar. We are unable to distinguish in prin-

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ciple the fright of the farmer's workhorse in the adjacent field, the discomfort from the rumbling of trains and smoke of locomotives, the unsightliness of railroad tracks and numerous cars, from the elevation of the embankment comparatively slight in perspective, of which the present petitioners complain. The embankment as a new bed for the pre-existing railroad does not interfere with light and air upon the petitioners' estate. At the distance of over one hundred and fifty feet across a highway and intervening property of other owners, at its elevation it can hardly be said to affect their estate directly in the sense that it is so near as to prevent or diminish or seriously to interfere with the valuable use of the estate by its physical imminence or by obliterating any features essential to its enjoyment. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 391, 392. The interference with the view from the petitioners' house and estate, which is the sole ground on which damages are sought in the case at bar, seem to us to relate to matters too remote and speculative and are not sufficiently distinct, separate, special and peculiar to the petitioners to warrant a recovery even under the broad rule established by the statute. They are not different in kind from those suffered by all the public who travel on Mill Street, but only greater in degree. The scar upon a landscape resulting from a high railroad embankment and the consequent intrusion of the business of railroading upon the solitude of hill and mountain may have an appreciably deleterious effect upon a distant estate whose chief market value may lie in its remoteness and seclusion from evidences of commercialism. It is conceivable that evidence might be proffered tending to show that such intrusion was obnoxious and the effect upon market value was substantial. No decision here or elsewhere, so far as we are aware, ever has gone so far as to hold that damages might be recovered for invasion of purely æsthetic elements of value such as these.

The present case does not call for a determination that no circumstances can arise which would warrant the recovery of damages under a statute similar in terms to the one here controlling for the obtrusion of ugly structures into a fine prospect. When cases approach close to the line, decision becomes difficult. But we are of opinion that the interference with view shown by the facts here disclosed does not reach to a special and peculiar dam-

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age to the petitioners differing in kind from that suffered by the general public. As matter of authority, we think their claim for damages falls within the class held in the decisions to which reference has been made to be too remote, speculative and general to be foundation for recovery under this statute and is indistinguishable in principle from them.

Exceptions sustained.

JOHN A. MARSHALL *vs.* COLUMBIA MANUFACTURING COMPANY & trustee.

Suffolk. March 9, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach. *Practice, Civil*, Premature action, Exceptions. *Time.*

Where, at the trial of an action against a manufacturer for the alleged breach of a contract to employ the plaintiff for a year, the plaintiff's testimony tends to show that he was discharged unjustifiably within a few days after his employment began and that he brought the action afterwards on the day of his alleged discharge, and the only question is whether the action was brought before the contract was broken, the defendant is not entitled to a ruling that there was no breach of the contract at the time the action was brought.

CONTRACT for the alleged breach of an agreement to employ the plaintiff for a year from October 1, 1912. Writ dated October 7, 1912.

In the Superior Court the action was tried before *Fessenden*, J., together with an action against Edward A. Rollins, who was the defendant's treasurer, begun on the same day and charging substantially a breach of the same contract. The plaintiff was the only witness.

As to his discharge and the bringing of this action and the action against the defendant's treasurer, the plaintiff testified that he went to work under his contract on Monday morning, October 7, 1912; that some time during the forenoon he was called into the office by the defendant's treasurer, who was the man in charge of the business, and was told that the treasurer had been misled and

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that the plaintiff had better look for another job; that the plaintiff told him he did not understand how that was; that the treasurer said he had been misled, that was all, and that the plaintiff would have to look for another job; that after the conversation he worked until twelve o'clock; that he returned again to work at half past one and continued to work until six o'clock on that day; that after he was discharged he went to see his attorney at his office with reference to the matter, the evening of the same day on which he was discharged; that it was the first time that he saw him with reference to it; that the attorney drew up the writs in his office that evening; that the plaintiff then gave his attorney the facts as to where the people were; that he was not out of the premises for an hour and a half Monday, October 7, consulting counsel. Upon his attention being called to the return of the officer on the writ in which Edward A. Rollins was defendant, to the effect that service was made upon a trustee named therein at ten minutes after three o'clock in the afternoon of October 7, he said that he did not know anything about what the officer made out; that he did not know how the writs were made out; that he told his attorney, for whom he was working, that he was working for the Columbia Manufacturing Company, and Mr. Rollins was the treasurer; that it was not possible that he went back the second time to his attorney that night.

The bill of exceptions contained the following statement:

"The defendant claimed that as a matter of law there had been no breach of any contract on its part at the time the action against it was brought, and requested the court to rule that the plaintiff could not maintain his action against the defendant because the action was prematurely brought. The court refused so to rule, and the defendant duly excepted.

"This case was submitted to the jury under proper instructions. So far as these exceptions are concerned, the court left it for the jury to determine whether as a matter of fact the writ in this case was made before or after the plaintiff was discharged, if they found he was discharged; and instructed them that if the writ was made before he was discharged and demand made, they should return a verdict for the defendant; if it was brought after he was discharged and after demand, they should return a verdict for the plaintiff if he had proved the other parts of his case."

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The jury found for the plaintiff in the sum of $233.38; and the defendant alleged exceptions.

T. R. Bateman, for the defendant.

E. Carr, for the plaintiff.

CARROLL, J. The plaintiff and the defendant entered into a contract by which the plaintiff was to work for it for a year beginning October 1, 1912, as a leather worker. The only evidence in the case came from the plaintiff. He testified that on the seventh day of October, 1912, he was discharged and on that same night he went to the office of his attorney who then sued out the writ which was dated October 7, 1912, and according to the officer's return, was served the following day on the trustee, and on October 10, 1912, was served on the defendant. The single question is whether the writ was brought before there was a breach of the contract.

The evidence was before the jury under proper instructions, and they decided that the writ was not brought until after the contract was broken, as they had a right to do.

Exceptions overruled.

BARBARA G. CHAMBERS'S CASE.

Suffolk. March 10, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CARROLL, JJ.

Habeas Corpus. Supreme Judicial Court. Practice, Civil, Appeal, Exceptions. *Probate Court*, Jurisdiction. *Constitutional Law. Guardian. Parent and Child. Illegitimacy.*

No appeal lies from a decision or order of a single justice of the Supreme Judicial Court dismissing a petition for a writ of habeas corpus.

It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus. The usual method of bringing the question of the correctness of such rulings before this court is by a report or a reservation by the single justice, or an adjournment of the case into this court for determination.

The Probate Court has jurisdiction to appoint as guardian of an illegitimate child a person other than the child's mother, although the mother is living.

The Legislature has power to authorize the appointment, as guardian of an illegitimate child with custody of the child's person, of some one other than the child's mother, although the mother is living.

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Where, upon the filing of a petition for a writ of habeas corpus seeking the discharge of an illegitimate minor from the custody of a guardian appointed by the Probate Court, an order is issued to the guardian to appear and show cause why the writ should not issue, and, on the return day of the order of notice, a single justice of this court ascertains by inquiry of the attorney for the petitioner that the ground upon which the petitioner rested was want of jurisdiction of the Probate Court to appoint a guardian of the child, it is proper for the single justice to hear the parties without the issuance of the writ or the production of the minor for the purpose of ascertaining whether there is cause, *prima facie*, for the issuance of the writ, and after such hearing to dismiss the petition.

RUGG, C. J. Habeas corpus is a proceeding at law. No appeal lies from a decision or order of a justice of this court made at common law. *Channell* v. *Judge of Central District Court of Northern Essex*, 213 Mass. 78, and cases there collected. The appeal must be dismissed.

It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus, for the reason that it might be inconsistent with its purpose, which is to try forthwith the right of a person to his liberty, if its granting could be delayed by exceptions. *Wyeth* v. *Richardson*, 10 Gray, 240. *King's Case*, 161 Mass. 46. *Bishop, petitioner*, 172 Mass. 35. The usual course has been for the presiding justice to reserve, report or adjourn cases into the full court where its determination ought to be had. *King's Case*, 161 Mass. 46, 49. *Plympton's Case*, 196 Mass. 571. *Sellers's Case*, 186 Mass. 301. *Morton's Case*, 196 Mass. 21. *Duddy's Case*, 219 Mass. 548. But if it be assumed in favor of the petitioner that the case is here properly, without so deciding, no error is shown.

The complaint of the petitioner on the merits is that she, being a spinster, the Probate Court has appointed a guardian of her minor child and has decreed that such guardian shall have the custody of the child until its further order. There was a hearing in that court and an adjudication that the mother was an unsuitable person to have the custody of her minor child. The contention is that the Probate Court has no jurisdiction to appoint a guardian under these circumstances. But this is not so. Plainly the statute confers such jurisdiction. *Gibson, appellant*, 154 Mass. 378. There is no limitation of jurisdiction, either by express terms or fair implication, in R. L. c. 145, § 1, or c. 162, § 3, to the appointment of guardians for children born in lawful wedlock.

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The words of the statute confer that jurisdiction in broad terms and include all minor children whatever may be their status in other respects. In reason there is quite as much necessity for the appointment of guardians for illegitimate minors as of any others.

The proceedings for the appointment of the guardian appear to have been regular, and due notice to have been given to the parent. Moreover, the mother later filed in the Probate Court a petition to set aside the appointment of the guardian and finally consented to the dismissal of that petition. She is bound by that decision. *Rothschild* v. *Knight*, 176 Mass. 48, 55.

Beyond doubt the Legislature has the power to authorize the appointment of a guardian with custody of the minor, and thus to deprive the mother for good cause shown of the custody of the child. *Dumain* v. *Gwynne*, 10 Allen, 270. *Purinton* v. *Jamrock*, 195 Mass. 187.

When the petition for the writ was filed, an order of notice was issued to the guardian to appear and show cause why the writ should not issue. Upon the return of the order, the guardian appeared and (as stated in the exceptions) "filed a writing purporting to be a reply to the petition and complaint." When the matter was called for hearing, the presiding justice * ascertained by inquiry of counsel that the ground upon which the petition rested was want of jurisdiction in the Probate Court to appoint a guardian of the child. The presiding justice then assumed that all the material allegations set out in the complaint were true, for the purpose of raising that question, and, after hearing arguments of counsel, ordered that the petition be dismissed. The complainant's contention that this procedure was irregular and that the writ should issue and the hearing be had only after the person has been brought into court, cannot be supported. It was decided to the contrary in *Sims's Case*, 7 Cush. 285, after elaborate consideration, when the statute was in substance the same as now. It there was said by Chief Justice Shaw, in disposing of a similar argument: "Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground *prima facie* for his discharge, the court will not issue the writ. And on a

* *Pierce*, J.

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slight recurrence to the cases, we are of opinion that this is the established rule and practice at common law. Indeed the ordinary course is, for the court applied to, to grant a rule *nisi* in the first instance to show cause why the writ should not issue. Of course, if sufficient cause is shown, it will be withheld. . . . It is urged that this is a writ of right, and therefore grantable without inquiry. But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, and the party claiming it might go to the clerk and sue it out, as he may a writ on a claim for land or money. It is a writ of right in a larger and more liberal sense; a right to be delivered from all unlawful imprisonment. Nor does this limit or restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently, on the return of the writ, or partly on the one, and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law."

It is now a common practice to hear the case upon the petition. *Bishop, petitioner*, 172 Mass. 35. *Sellers's Case*, 186 Mass. 301. *Flito's Case*, 210 Mass. 33. It is especially appropriate where the welfare of a child is under inquiry. It is of no consequence whether the hearing be upon application for leave to file a petition for the writ, as is the practice in the federal courts, *In re Boardman*, 169 U. S. 39, *Ex parte Baez*, 177 U. S. 378, or upon order of notice to show cause, as is the practice in this Commonwealth. The principle is the same. By either method the substance of this writ, so essential for the preservation of freedom, is preserved unimpaired with all its time honored vigor.

Appeal dismissed.
Exceptions overruled.

P. J. Casey, for the petitioner.
J. A. Lowell, (*J. E. Ewers* with him,) for the respondent.

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JULIUS ISENBERG *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 10, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Railroad. Carrier, Of passengers. *Assault and Battery.*

When on a railroad train the conduct and speech of one passenger toward another is such that violence is likely to result unless some action is taken to prevent it, and the railroad corporation has reasonable notice of the situation and has the opportunity to take measures to prevent the impending violence, it becomes the duty of the corporation to protect the threatened passenger and to see that no harm comes to him.

When a passenger on a railroad train has complained to the conductor that another passenger in the same car has been insulting and annoying him and threatening him with violence and after the conductor has left the car a trainman enters it and, seeing what is going on, asks the troublesome passenger to leave the quiet passenger alone and to cease bothering him, and the troublesome passenger says to the trainman "Get out of here," whereupon the trainman at once goes away into another car or compartment and the troublesome passenger then assaults the quiet one, striking him in the face with his fist, knocking him over and causing his head to bleed, the assaulted passenger on these facts is entitled to go to the jury in an action against the corporation operating the railroad for permitting the assault and battery.

TORT for permitting an assault and battery to be committed upon the plaintiff when he was travelling from Boston to Bridgewater as a passenger on a railroad train of the defendant on June 25, 1912. Writ dated November 5, 1912.

In the Superior Court the case was tried before *Brown*, J. At the conclusion of the plaintiff's testimony by agreement of counsel both parties rested, and it was agreed that Peters, mentioned in the opinion, who committed the assault had been discharged by the defendant on May 10, 1912, and was not at the time of the assault an employee of the defendant nor entitled to travel on a pass from the defendant, although he was travelling upon such a pass. The facts that could have been found upon the plaintiff's testimony are stated in the opinion. The judge ordered a verdict for the defendant and reported the case for determination by this court with a stipulation of the parties that, if the ordering of

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the verdict was wrong, judgment was to be entered for the plaintiff in the sum of $300.

S. L. Bailen, for the plaintiff.

A. W. Blackman, for the defendant.

CARROLL, J. The facts were substantially as follows. The plaintiff, while a passenger on one of the defendant's trains, was assaulted and injured by another passenger who was formerly, but not at the time of the assault, in the employ of the defendant. The name of this passenger was Peters.

The plaintiff occupied a front seat in the smoking compartment of a combination baggage and smoking car. Shortly after the train started, Peters began annoying and threatening damage to the plaintiff. As the conductor came through the train, the plaintiff complained to him of Peters' conduct. The conductor looked at Peters, but said nothing to him, and Peters ceased further to annoy the plaintiff while the conductor was in the car. As soon as the conductor passed to another car, Peters again began to threaten violence to the plaintiff and to indicate that he would destroy his baggage. Thereupon a man with a "uniform of the train," whom the jury could find was a trainman in the employ of the defendant, came from the baggage compartment, and seeing what was going on asked Peters to let the plaintiff alone and to cease bothering him. As he said this, Peters told the trainman to "Get out of here," and the trainman at once went away into another car or compartment. Immediately on the departure of the trainman Peters renewed the threats of violence, tore up the paper the plaintiff was reading, and as the plaintiff was moving to another seat to get away from him, Peters struck him in the face with his fist, knocking him over and causing his head to bleed.

The principle which governs this class of cases is well settled. A common carrier is not bound to anticipate every possible peril which may happen to its passengers. It is not, as frequently has been said, an insurer of their safety and security. It is not obliged to foresee the impossible or highly improbable, and it is not called upon under ordinary circumstances to expect that one passenger will assault another; or that because one passenger is engaged in frolic or sport with another, such conduct will result in injury to one of them. But where the circumstances are such and the

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conduct, speech or manner of one passenger toward another indicates that violence or harm is likely to result, and the carrier has reasonable notice of such circumstances and conduct, and has the opportunity to take measures to prevent the threatened violence, then it becomes its duty to protect the threatened passenger and see that no harm comes to him.

If there was nothing in the way of knowledge of the disturbance brought home to the defendant except what was known to the conductor, it well might be claimed that there was nothing in the evidence to show that a recurrence of the trouble might be expected. But there was further evidence when the trainman, or one whom the jury could find to be such, came upon the scene and knew the plaintiff's complaints and saw the attitude and conduct of Peters and heard his speech, and did nothing to prevent a further outbreak. It then became a question for the jury whether in view of all the circumstances, the defendant complied with the obligation resting upon it of using the highest degree of caution in looking forward to and preventing injury to passengers from all sources, which is consistent with its undertaking. *Glennen* v. *Boston Elevated Railway*, 207 Mass. 497. *Nute* v. *Boston & Maine Railroad*, 214 Mass. 184. *Hull* v. *Boston & Maine Railroad*, 210 Mass. 159.

In accordance with the terms of the report, judgment is to be entered for the plaintiff in the sum of $300.

Ordered accordingly.

COMMONWEALTH *vs.* J. O. ZIMMERMAN.

Suffolk. March 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Physicians and Surgeons. License. Chiropractic. Constitutional Law. Words, "Medicine."

One who calls himself a chiropractor and, without a license to practice medicine, is engaged in the practice of chiropractic, which "is the specific science that removes pressure upon the nerves by the adjustment of spinal vertebrae" by hand only without the use of instruments, may be found guilty of practicing medicine without a license within the meaning of R. L. c. 76, § 8.

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R. L. c. 76, § 8, providing penalties for practicing medicine within this Commonwealth without a license is constitutional.

The provision of R. L. c. 76, § 9, that the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered "shall not apply to . . . osteopathists, pharmacists, clairvoyants, or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian science or cosmopathic method of healing, if they do not violate any of the provisions of section eight," does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on February 20, 1914, charging that the defendant at Boston on December 15, 1913, and on divers other days between that day and the day on which the complaint was received and sworn to, did practice medicine without being lawfully authorized to do so and registered, in violation of R. L. c. 76, § 8.

On appeal to the Superior Court the defendant was tried before *Dana*, J. The only defence was that the defendant was a chiropractor and that his acts were not in violation of the statute on which the complaint was based. The evidence is described in the opinion. The bill of exceptions stated that the judge "without objection or exception, stated to the jury that the defendant did not claim that he came within any of the exemptions of R. L. c. 76, § 9; that he did not claim that he was an osteopath; and also that he claimed that what he did for persons resorting to him was something different from massage."

At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the jury would not be warranted in finding the defendant guilty, and to direct the jury to return a verdict of not guilty. This the judge refused to do.

The defendant then asked the judge to make various rulings and, among other requests, asked him to rule that the provisions of R. L. c. 76, §§ 8, 9, were unconstitutional as applied to the defendant as being in violation of art. 6, 7 of the Declaration of Rights and in violation of the Fourteenth Amendment to the Constitution of the United States.

The judge refused to make this ruling or any other of the rulings requested by the defendant except so far as they were em-

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bodied in his charge. The jury returned a verdict of guilty; and the defendant alleged exceptions.

R. L. c. 76, §§ 8, 9, are as follows:

"Section 8. Whoever, not being lawfully authorized to practice medicine within this Commonwealth and registered as aforesaid, holds himself out as a practitioner of medicine, or practices or attempts to practice medicine in any of its branches, or whoever practices medicine or surgery under a false or assumed name, or under a name other than that by which he is registered, or whoever personates another practitioner of a like or different name, shall, for each offence, be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for three months, or by both such fine and imprisonment. In a case in which a provision of this or the preceding section has been violated, the person who committed the violation shall not recover compensation for services rendered.

"Section 9. The provisions of the eight preceding sections shall not be held to discriminate against any particular school or system of medicine, to prohibit medical or surgical service in a case of emergency, or to prohibit the domestic administration of family remedies. They shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service in the performance of his official duty; to a physician or surgeon from another State who is a legal practitioner in the State in which he resides, when in actual consultation with a legal practitioner of this Commonwealth; to a physician or surgeon residing in another State and legally qualified to practice therein, whose general practice extends into the border towns of this Commonwealth, if such physician does not open an office or designate a place in such towns where he may meet patients or receive calls; to a physician authorized to practice medicine in another State, when he is called as the family physician to attend a person temporarily abiding in this Commonwealth; nor to registered pharmacists in prescribing gratuitously, osteopathists, pharmacists, clairvoyants, or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian science or cosmopathic method of healing, if they do not violate any of the provisions of section eight."

The case was submitted on briefs.

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S. L. Long (of Missouri), *& N. Sternseher*, for the defendant.

J. C. Pelletier, District Attorney, *T. D. Lavelle & A. C. Webber*, Assistant District Attorneys, for the Commonwealth.

RUGG, C. J. The defendant has been found guilty of violation of R. L. c. 76, § 8, in that he practiced medicine without being lawfully authorized. He defends on the ground that he is a chiropractor and that his acts do not constitute a violation of the statute. The evidence tended to show that he kept an office in Boston, indicated by a sign on which was his name followed by the word, chiropractor; that he practiced for pay; that he said that the basis of chiropractic is the adjustment of the vertebrae of the spine; that the vertebrae when not in their normal positions press upon the nerves at the spine; that the malposition of these vertebrae was the cause of abnormality and that an adjustment of these vertebrae to their normal positions would remove the pressure at the spine; that he said that he did not cure, that he simply adjusted. He testified that "chiropractic is the specific science that removes pressure upon the nerves by the adjustment of spinal vertebrae. There are no instruments used. It is done by hand only." The treatment pursued by the defendant was to have those who resorted to him go into an inner room and remove their outer garments until they were stripped to the waist. The patient then took a sitting position. The defendant examined down the spine, beginning at the top, by feeling with his fingers to see whether each vertebra was in its proper position. The method to discover whether a vertebra was out of position was by making a gliding move of the three middle fingers of the right hand, which constituted the process of "palpation" whereby one vertebra was compared with another. As a result of this "analysis" the defendant was able to tell whether vertebrae were out of alignment or out of their normal positions. In making "adjustments," the patient was placed on a low table with face downward and the vertebra which was out of condition was given a quick thrust or push by the hands of the defendant. The acts performed by the defendant constitute, first, an examination of the vertebrae of the spinal column and a determination whether they are in a normal or in an unnatural position; and, second, a manipulation of such of the vertebrae as are found to be out of position, so that they will become regular and correct with reference to each other. Although

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the defendant did not prescribe medicine, and testified that he paid no attention to the patient's description of symptoms or disease, yet it is obvious that his purpose was to treat the human body in order to make natural that which he found abnormal in the narrow field of his examination. The removal of pressure upon nerves is a means of relieving the ills flowing from that source. "Chiropractic" is defined as "A system of healing that treats disease by manipulation of the spinal column." Webster's International Dictionary. The defendant's manipulation was of a most important part of the body and related to a nerve centre. It might have been found that it could have no other aim than a prevention of disease or relief from existing disarrangement of body functions. That which the defendant did and its manifest purpose might have been found to be practicing medicine within the meaning of the statute. Medicine relates to the prevention, cure and alleviation of disease, the repair of injury, or treatment of abnormal or unusual states of the body and their restoration to a healthful condition. It includes a broad field. It is not confined to the administering of medicinal substances or the use of surgical or other instruments. It comprehends "a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and of the laws of health and the modes of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures." Knowlton, C. J., in *Commonwealth* v. *Jewelle*, 199 Mass. 558, 560. In order to practice medicine one need not cover the entire field of the science. If he devotes himself to a very restricted part of it, he still may be found to practice medicine. It is matter of common knowledge that there has been great specialization in that profession in recent years. To that effect are the decisions. *Commonwealth* v. *Porn*, 196 Mass. 326. *People* v. *Gordon*, 194 Ill. 560. *Witty* v. *State*, 173 Ind. 404. *People* v. *Allcutt*, 117 App. Div. 546, affirmed in 189 N. Y. 517.

It is of no consequence that the defendant abstained from the use of the words "diagnosis," "treatment," or "disease" in description of what he did, and employed the terms "analysis," "palpation" and "adjustment." The acts which he did and their manifest design are to be examined rather than the words used, in order to ascertain the true nature of the defendant's conduct. A

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physical examination of the vertebrae, a decision whether they are in normal position or not, and strong manual pressure upon them with the end of changing the position with reference to each other of those found to be irregular, and thereby relieving pressure upon nerves, may be found to have such relation to the cure or prevention of disease or the relief of pain as to constitute the practice of medicine. Numerous decisions upon kindred facts point in the same direction. *State* v. *Corwin*, 151 Iowa, 420. *Green* v. *Hodges*, 91 Kans. 658. *State* v. *Smith*, 233 Mo. 242. *Swarts* v. *Siveny*, 35 R. I. 1. *State* v. *Greiner*, 63 Wash. 46.

The judge stated to the jury, without objection or exception, that "the defendant did not claim that he came within any of the exemptions of § 9 of c. 76 of the Revised Laws." Hence it is not open to the defendant now to contend that his practice rightly may be described as "cosmopathic method of healing," the final exception in § 9. Even if this point had been saved, there is nothing in it. "Cosmopathic" is defined in the New Standard Dictionary as "Open to the access of supernormal knowledge or emotion, supposedly from a preternatural world." Without undertaking to decide what a "cosmopathic method of healing" may be, plainly it does not include the defendant's operations.

The statute as thus construed is constitutional. That was decided in *Commonwealth* v. *Porn*, 196 Mass. 326, and affirmed in *Commonwealth* v. *Jewelle*, 199 Mass. 558. A somewhat similar statute was upheld in *Hewitt* v. *Charier*, 16 Pick. 353. To the same effect in principle are *Dent* v. *West Virginia*, 129 U. S. 114, and *Collins* v. *Texas*, 223 U. S. 288, and cases there cited. See also *State* v. *Johnson*, 84 Kans. 411. The protection of the public from those who undertake to treat or manipulate the human body without that degree of education, training and skill which the Legislature has prescribed as necessary to the general safety of the people is within the police power of the State. This general purpose may be effectuated by requiring even of those who propose to confine their practice to a narrow specialty a much broader knowledge of the subject provided such qualification is regarded by the Legislature as necessary for the practice of any branch of medicine. The statute does not impair in any constitutional sense the liberty of the defendant. The protection of the public health is an object of such vital importance to the welfare of the State that

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any rational means to that end must be upheld. The defendant is placed in no worse position than others. The circumstance, that R. L. c. 76, § 9, to an extent, see *Commonwealth* v. *DeLon*, 219 Mass. 217, exempts certain classes, such as osteopaths and pharmacists, and those practicing Christian science, mind cure, massage and others, does not render the statute unreasonable as to the defendant nor deny to him the equal protection of the laws. Reasonable classification is within the power of the Legislature. Its determination in this regard cannot be overthrown upon the facts disclosed on this record. Every constitutional aspect of the statute is so fully covered by the decisions above cited that further discussion would be superfluous.

Exceptions overruled.

COMMONWEALTH *vs.* NEW ENGLAND COLLEGE OF CHIROPRACTIC.

Suffolk. March 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Granting Degree without Authority. Chiropractic. Words, "Doctor," "Degree."

The giving without legislative authority by an incorporated "college of chiropractic" of a certificate naming the holder as a "Doctor of Chiropractic" is punishable under R. L. c. 208, § 75, as granting a degree "without the authority of a special act of the General Court granting the power to give degrees."

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on August 14, 1914, charging that the defendant, a corporation called the New England College of Chiropractic, on June 4, 1914, at Boston granted to one Alfred H. Flower a degree as a Doctor of Chiropractic, without the authority of a special act of the General Court granting the power to give degrees, in violation of R. L. c. 208, § 75.

On appeal to the Superior Court a motion to quash the complaint was denied, and the defendant was tried before *Aiken*, C. J. The evidence is described in the opinion. At the close of the evidence the defendant asked the Chief Justice to make the following rulings:

"1. To affix to a name the letters 'D.C.,' which stand for a

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'Doctor of Chiropractic,' under the first half of R. L. c. 208, § 75, is not an offence, because the letters 'D.C.' do not represent any degree authorized by law, that is, issued by any institution of learning authorized by an act of the Massachusetts Legislature to issue degrees.

"2. To give a certificate, naming the holder as a 'Doctor of Chiropractic' or 'D.C.,' is not to confer a degree, because neither the name 'Doctor of Chiropractic' nor the letters 'D. C.' stand for any degree conferred by any institution of learning authorized to issue degrees by any act of the Massachusetts Legislature.

"3. It is against all the rules for the construction of legislative enactments, especially penal statutes, that the same word shall have two meanings in the same sentence. In the first half of section 75, the word 'degree' means degrees authorized by law. In the latter portion of the same sentence the word 'degree' as interpreted by the complaint against the defendant, must mean a degree not authorized by law. In other words, if the defendant should grant the degree 'M.D.' it would clearly be an indictable offence under section 75 because it granted an authorized degree without being legally authorized so to do. Therefore it cannot be indicted for granting the title 'D.C.' because in so doing it confers a title not recognized by law as a degree, unless the court shall give to the same word two meanings in the same sentence. That is to say, that in the first half of section 75 the word 'degree' means degree authorized by law. In the second half it must mean, in order to hold the defendant, unauthorized by law."

The Chief Justice refused to make any of these rulings, and submitted the case to the jury, who returned a verdict of guilty. The defendant alleged exceptions.

The whole of R. L. c. 208, § 75, of which a part is quoted in the opinion, is as follows:

"Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree of a college or other educational institution of this Commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this Commonwealth, and whoever, without the authority of a special act of the General Court granting the power

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to give degrees, offers or grants degrees as a school, college or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment."

R. S. Hoar, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. This is a complaint wherein the defendant corporation is charged with granting the degree of Doctor of Chiropractic without authority and contrary to the statute.

There was at the trial no controversy touching the fact that the defendant issued a certificate in which it was stated amongst other matters that "Alfred H. Flower, M.D., having satisfactorily completed the prescribed Courses of Study in the New England College of Chiropractic, passed the examinations and met all other requirements for graduation, has been declared a Doctor of Chiropractic." This certificate was signed by seven persons, all of whom wrote after their names the letters "D.C.," five also adding letters indicative of well recognized degrees such as B.S., M.D., D.D.S.

Flower, called as a witness by the Commonwealth, after stating that the degree of Doctor of Medicine had been conferred upon him by another institution, to the question "Have you a degree of Doctor of Chiropractic?" replied, "Yes; that is what it claims, I believe." He further testified that the New England College of Chiropractic conferred that degree on him and that at the same time the degree was conferred upon perhaps a dozen other persons; and that the ceremony was similar to any college or high school graduation upon a commencement day. Officers and members of the faculty of the defendant testified in substance that the letters "D.C." stood for Doctor of Chiropractic, but that it was not a degree. It is not contended that the defendant was authorized by any special or general act of the Legislature to confer degrees. It requires no discussion to demonstrate that the evidence of the witness Flower, if believed, warranted a finding by the jury that Doctor of Chiropractic was treated as a degree.

The provision of R. L. c. 208, § 75, material to the present prosecution is, ". . . Whoever, without the authority of a spe-

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cial act of the General Court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual, . . . shall be punished. . . ." Its obvious purpose is to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition. The earlier part of the section deals with the simulated possession of educational distinctions, including college degrees. The section as a whole is an effort to punish the issuing and holding of sham degrees from colleges and other educational institutions. It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it and to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning. *Wright* v. *Lanckton*, 19 Pick. 288, 291.

The statute should be interpreted in the light of its design to effectuate its purpose so far as the words used reasonably construed permit of this result. Considered historically and according to present practice, there are three general grades of such degrees, namely, — Bachelor, Master and Doctor; although by some institutions intermediate distinctions are granted. In common speech as well as in university parlance, "Doctor" as a prefix to a person's name signifies an academic distinction founded upon having received a degree. The same is true when other initials in combination with D. are written after the name, as D.D., LL.D., Ph.D., M.D. It is not to be assumed that the statute was intended to relate only to such degrees as were in use at the time it was enacted. It is comprehensive in its terms and includes whatever properly may be described as a degree at any time. It is possible that institutions authorized to grant degrees may establish and grant the degree here in question. "Doctor" is used commonly to indicate skill in the general subject of medicine. Doubtless one purpose of the Legislature in enacting the statute was to protect the public from the imposition and suffering which might follow the indiscriminate use of a title conveying the implication of skill to treat disease by those who have pursued no adequate course

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of study to qualify them. "Chiropractic" is a new word. But it has been held in *Commonwealth* v. *Zimmerman, ante,* 184, that one practicing it may be found to be practicing medicine. "Degree," as used in this statute, is any academic rank recognized by colleges and universities having a reputable character as institutions of learning, or any form of expression composed in whole or in part of words recognized as indicative of academic rank, alone or in combination with other words, so that there is conveyed to the ordinary mind the idea of some collegiate, university or scholastic distinction. While this definition may not include all instances, it is sufficiently accurate for the present case. The ordinary diploma of public or private schools, simply certifying to the completion of a course of study, does not contravene the statute. But when a title like "Doctor," commonly associated with unusual skill acquired by academic or professional study in schools or colleges, is conferred either separately or associated with other words, the statute is violated. The conferring of a title made up of the word "Doctor" and a word relating to the healing art may be found to be the granting of a degree within the meaning of the statute. The word "Doctor" in connection with an unusual and high sounding word would be quite as likely to impose upon the ignorant and credulous as the false use of the conventional Doctor of Medicine.

As thus construed, the word "degree" is used with a consistent meaning throughout the section and effectuates the design of the statute to protect the public against imposition. It follows that the three requests for instructions presented by the defendant rightly were denied.

Exceptions overruled.

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EDWARD LENZI, administrator, *vs.* HANSCOM CONSTRUCTION COMPANY.

Middlesex. March 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence.

Where a construction company made a contract with a teamster, that the teamster should haul sand for it at so much a load from a sand pit which belonged to a person who had given permission to the company to take the sand provided his asparagus bed on the high land above one side of the pit was not undermined, and the only direction given to the teamster by the company as to the manner of taking sand was that the company's superintendent told him not to take sand from under the asparagus bed, and where a son of the teamster, seventeen years of age, who had driven a team for three years and was a bright, capable boy and a capable teamster, was in charge of one of his father's teams and while he was filling his team with sand an overhanging tree on the edge of the pit fell upon him and killed him, an action under St. 1907, c. 375, cannot be maintained against the company to recover damages for the boy's death; because the danger from the overhanging tree on the edge of the pit was as apparent to the boy as it was to the company, so that there was no duty to warn the boy of this danger, and as the employee of his father he was left to dig the sand in any way he chose that did not undermine the owner's asparagus bed.

TORT under St. 1907, c. 375, by the administrator of the estate of Lorenzo Lenzi, late of Sudbury, to recover damages to the use of the next of kin of the plaintiff's intestate for the death of the intestate from a tree falling upon him on December 8, 1911, in consequence of which he died two days later, the death being alleged to have been caused by the negligence of the defendant and its servants in permitting the tree to fall upon the intestate when he was not in the employ or service of the defendant and was in the exercise of due care. Writ dated June 25, 1912.

In the Superior Court the case was tried before *Fox*, J., who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. D. Hill, for the plaintiff.

W. B. Sprout, (*F. B. Kendall* with him,) for the defendant.

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LORING, J. This is an action brought under St. 1907, c. 375, to recover a penalty for the death of the plaintiff's intestate, who was a minor son of the plaintiff. The intestate worked as a driver of one of the plaintiff's teams. The plaintiff had agreed to haul gravel for the defendant at so much a load, and the defendant had obtained a license from the owner of a sand pit (Wheeler by name) to take sand from his pit at so much a load. When Wheeler gave the defendant leave to take sand from his pit he told the defendant's superintendent that he did not want him to take the sand from one side of the pit (then pointed out) because he (Wheeler) had an asparagus bed which came almost to the edge of the high land above the pit at that point and if the sand were dug at that point the asparagus bed might fall into the pit. It seems to be agreed that hauling sand from Wheeler's pit was substituted for hauling gravel from the gravel pit, without dissent, and that in hauling sand the intestate was acting as an employee of his father, who had contracted to haul at so much a load.

The only eyewitness of the accident was one Buniello, who testified through an interpreter. His testimony is in some respects not intelligible, and in some respects seems to be contradictory. But upon the essential facts it is plain.

Buniello was sent by the defendant to help the intestate in loading his team with sand. When Buniello and the intestate first went to the sand pit the defendant's superintendent went with them and told them not to take sand from under the asparagus bed. Except for this caution there was no evidence that the superintendent gave any directions to the intestate or that he undertook to direct how the intestate should do his work. The matter in this connection was summed up by Buniello in these words: "Lenzi [the intestate] put his team where he wanted to take the dirt; sometimes he took it on one side and sometimes on the other side."

It appeared that at the top of the southerly side of the sand pit and on the edge of the top of that side there was a large oak tree which fell into the pit and killed the intestate. Buniello's testimony as to the accident here in question is in these words: "He [the intestate] was not digging at any time under the tree. When he was digging on the side opposite the water, he was quite a distance away from the tree; that when he was digging on the side

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towards the water, he was quite a little distance away from the tree, so that whenever he [the witness] was working there that day with the Lenzi boy he kept away from the tree; that they were both filling the team; (that it was late in the evening; that there was no sun or lamps at the time); that the first thing that indicated any danger was when he heard a noise; that both ran to get away from the falling tree; that the team was eight or nine feet away from the tree when the accident happened; that Lenzi was seven feet away from the tree."

The case made out by the plaintiff is this: The intestate was an employee of a contractor who agreed with the defendant to haul sand, at so much a load, from a pit owned by a third person who had given the defendant leave to take sand from his pit, at so much a load. The defendant did not undertake to direct the intestate's employer how to do the work of digging the sand, but left the manner of doing it to the intestate's employer as an independent contractor and to the intestate as an employee of an independent contractor. The danger from the overhanging tree on the edge of this pit (which did not belong to the defendant) was as apparent to the intestate as it was to the defendant. By the testimony of the plaintiff (the intestate's father) the intestate was seventeen years of age, had driven a team for three years, and "was a bright, capable boy and a capable teamster." The only possible duty resting on the defendant under these circumstances would be the duty of warning the intestate of the danger from the tree. Under the circumstances there was no duty on the defendant to warn the intestate of this danger, which was as apparent to him as to the defendant. The case comes within *Hughes* v. *Malden & Melrose Gas Light Co.* 168 Mass. 395, and *Cole* v. *L. D. Willcutt & Sons Co.* 218 Mass. 71. We do not find anything in the cases cited by the plaintiff which requires special notice.

Under these circumstances it is not necessary to consider whether there was evidence that the intestate was actively looking out for his personal safety within the rule of *Hudson* v. *Lynn & Boston Railroad,* 178 Mass. 64, at the time of the accident. We put the matter in this way because St. 1914, c. 553, does not apply to this case.

Exceptions overruled.

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MARY A. O'MALLEY vs. AUGUST W. MEYER.

Suffolk. March 15, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Fence and Fence Viewers.

Upon a complaint of a landowner made to fence viewers under R. L. c. 33, where the erection of a division fence is desired, the fence viewers, if their award is to have any validity as the basis of a cause of action, must decide not only that a fence is necessary but also what part of the fence each landowner is to construct. In the absence of a decision as to such apportionment, a landowner, who, after the fence viewers determined that a division fence was necessary, built the whole of it himself, cannot maintain an action of contract against the owner of the adjoining land to recover double the value of one half of the fence he has built, his rights being governed and limited by the statute.

CONTRACT in the Municipal Court of the City of Boston under R. L. c. 33, to recover double the value of one half of a division fence erected by the plaintiff between the adjoining premises of the plaintiff and the defendant on Clarkson Street in the part of Boston called Dorchester. Writ dated October 17, 1913.

The case was heard by a judge of the Municipal Court who found for the plaintiff in the sum of $61, and at the request of the defendant reported the case to the Appellate Division.

The Appellate Division made an order that the finding be vacated and that judgment be entered for the defendant. The plaintiff appealed. The case as presented by the report is stated in the opinion.

The case was submitted on briefs.

W. J. O'Malley, Jr., W. Flaherty & J. P. Cleary, Jr., for the plaintiff.

H. Bergson, for the defendant.

CARROLL, J. This is an action under R. L. c. 33, to recover double the value of one half of a division fence erected by the plaintiff between her premises and the premises adjoining owned by the defendant.

In response to an oral application made by the plaintiff to one of the fence viewers of the city of Boston, "for a division fence

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between the estate of the plaintiff and the estate of the defendant," the parties were notified to be present on the premises at a hearing to be had on June 13, 1913, at 10.30 A. M. "relative to a division fence between properties." At this hearing the defendant did not appear. Failing to find the boundary line, the fence viewers had the premises surveyed, and on June 19, 1913, sent by mail to the defendant a notice requiring him to build within fifteen days, "your half of a picket fence, . . . this fence to be built on division line as shown by nail in stake driven into ground at sidewalk line of street and by nail driven into back yard fence and marked with red pencil. . . . Should you dispute this division line, you are requested to submit to the fence viewers a survey of your premises showing the correct line as you believe it to be within five days." A notice substantially the same was sent by mail to the plaintiff. Thereupon the plaintiff built the entire fence, and on July 28, 1913, the fence viewers, after an examination of it, notified the defendant in writing that they adjudged it to be a "sufficient fence within the law and to have the value of fifty cents per lineal foot for the whole length of one hundred fifteen (115) feet; a total value of $57.50."

The fence viewers made no assignment showing what particular portion of the fence was to be erected by each of the adjoining owners and they passed no order specifying the definite part of the fence each of the parties was to keep in repair. Sections 3 and 4 of R. L. c. 33, apply to a condition of affairs where the repair or rebuilding of an existing fence is in dispute and where one of the occupants refuses to keep his part in repair, contending that no fence is necessary, and that, if one is necessary, the fence already existing is sufficient. Under these sections of the statute the share of each owner already has been assigned and the only purpose of the fence viewers' action is to determine whether the existing fence is a sufficient fence. Sections 5 and 6 govern a case where a partition fence already has been built but never has been divided, and the part which each of the occupants should keep in repair is in dispute. *Sears* v. *Charlemont*, 6 Allen, 437. *Leonard* v. *Lyon*, 210 Mass. 248. Where no partition fence has been erected between adjoining lands and one of the owners seeks to have one erected, his application to the fence viewers should be made under § 13; and if the division line between the parties is in dispute or

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unknown, the fence viewers have the authority under this section, to designate a line on which the fence is to be built.

It is not perfectly clear from the report of the evidence, under which one of these sections of the statute the proceedings were begun. There is some evidence indicating that an old fence had been in existence before the proceedings were instituted. The memorandum of the judge states that there was a dispute concerning the boundary line between the parties, and the plaintiff contends in her brief that her right to recover is based on R. L. c. 33, § 13. Whether the action is brought under §§ 5 and 6, or under § 13, the right to recover depends upon the observance of the provisions of the statute. The plaintiff's rights originate in the statute and they are limited and governed thereby.

When an existing fence is out of repair and the share of each party therein has never been adjusted, the purpose of the decision of the fence viewers is to fix the share of each and to set out the specific part which each is to keep up and maintain. Where previously no fence has been erected and one is desired, the mere adjudication of the fence viewers that a fence is necessary is not enough; they must go further, if the award is to have any legal validity, and decide the part of the fence which each landowner is to construct, otherwise neither of the parties could know where he was to begin nor where he was to end in carrying out the orders of the fence viewers. So that aside from passing on the necessity of the fence, the most important duty of the fence viewers is to make the assignment of the respective shares.

The necessity of making a partition of the fence between the owners and assigning to each his share is shown by the various sections of the statute; and by § 14, where the true division line is found to vary from the line established by the fence viewers under § 13, each occupant must then remove and rebuild his part of the fence on the true line. In § 7, if before complaint is made to the fence viewers a fence has been built by one of the parties, the fence viewers are called in for the purpose of determining the share of each and the value of the same. And the right to recover double the value of a portion of a fence under § 6, is based on the assignment to each owner of a special part of the fence to build and care for the same.

The fence viewers having failed to comply with the statute, in

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neglecting to assign to each owner the particular share of each in the fence, the plaintiff cannot recover.

Judgment for the defendant affirmed.

CORNELIUS N. BLISS, JR., & others, executors, *vs.* CORNELIUS N. BLISS, JR., & others.

Suffolk. March 17, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions.

Promissory notes of a firm of five partners having offices in the State of New York, where two of the partners had their domicil, and in the State of Illinois, where one partner had his domicil, and in this Commonwealth, where two partners had their domicil, drawn and made payable in Boston to one of the New York partners and owned and kept by him in New York at the time of his death there, were not subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1, where it appeared that the articles of copartnership provided that the death of a partner should not dissolve the partnership but that the surviving partners should carry on the business with the right to use the firm name and to be entitled to its good will, that the accounts of the Boston office were kept separate from those of the other two offices, and that under the laws of the State of New York actions could have been brought upon the notes there and could have been prosecuted to judgments, for the satisfaction of which there was ample property of the firm in that State at the time of the testator's death; because the succession of the notes or their proceeds did not depend in any degree upon the moral or legal support or actual assistance of the laws of this Commonwealth. It was not material that for some purposes the Boston office was treated as the principal or home office of the firm, that the notes actually were paid by the Boston office of the firm, and that for reasons not relating to the notes the executor of the will of the owner of the notes resorted to the courts of this Commonwealth.

Registered bonds of this Commonwealth which were owned by a non-resident at the time of his death and were kept by him at the place of his domicil were subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1.

Where, under the law of the State of New York governing the succession tax in that State, a tax on successions was imposed on all tangible personal property in that State owned by a non-resident, and all intangible property of a non-resident, including bonds and shares of stock in foreign corporations, was not subject to the tax, a "like exemption" is made in favor of citizens of this Commonwealth to that given to non-residents by the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and therefore those provi-

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sions apply in the assessment of a succession tax upon registered bonds of this Commonwealth and shares of the capital stock of Massachusetts corporations owned by one who died domiciled in the State of New York, and such property was subject only to such portion of the tax as was in excess of the tax imposed by the laws of the State of New York.

Shares of the capital stock of Massachusetts corporations owned by one domiciled in another State at the time of his death were subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1.

PETITION, filed in the Probate Court on January 15, 1914, under St. 1909, c. 490, Part IV, § 21, by the executors of the will of Cornelius N. Bliss, late of New York City, and afterwards amended, to determine whether the petitioners should pay a tax of $43,662.01 certified by the tax commissioner to be due as a succession tax upon the following property of the testator:

Interest in the accumulated profits of Bliss, Fabyan and Company, Boston office, valued at	$3,220.28
Interest in the accumulated profits of Bliss, Fabyan and Company, New York and Chicago offices, valued at	8,178.94
Two promissory notes of Bliss, Fabyan and Company, with accrued interest, valued at	1,519,178.20
$10,000 principal amount of bonds of the Commonwealth of Massachusetts, registered, maturing 1935, bearing interest at the rate of 3½ per cent per annum, valued at	9,446.25
Shares of stock in various Massachusetts corporations, valued at	793,949.20

The petition was heard in the Probate Court by *Grant*, J., and a decree was made that the interest in the accumulated profits of the New York and Chicago offices of Bliss, Fabyan and Company and the registered bonds of the Commonwealth of Massachusetts were not "property within the jurisdiction of the Commonwealth" within the meaning of St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1, and were not subject to the tax; that the shares of stock in Massachusetts corporations, the interest in the accumulated profits of the Boston office of Bliss, Fabyan and Company, and the two promissory notes of Bliss, Fabyan and Company were "property within the jurisdiction of the Commonwealth" within the meaning of the statute; that the shares in Massachusetts corporations, the two promissory notes

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of Bliss, Fabyan and Company, and the interest in the accumulated profits of the Boston office of Bliss, Fabyan and Company were subject to the legacy or succession tax only to the extent of such portion of the tax as was in excess of the tax imposed thereon by the succession tax law of the State of New York, which portion in excess appeared to be the sum of $99.06; that the certification of the tax by the tax commissioner was not correct; and that the petitioners were liable for a tax amounting to $99.06.

The petitioners appealed from the decree so far as it determined that the notes of Bliss, Fabyan and Company were "property within the jurisdiction of the Commonwealth" and subject to the succession tax, and the Treasurer and Receiver General appealed from that portion of the decree relating to the registered bonds of the Commonwealth.

The case was reserved by *Carroll*, J., upon the pleadings, decree, claims of appeal and objections to the decrees and an agreed statement of facts, for determination by the full court.

R. Ernst, for the executors, stated the case.

W. H. Hitchcock & A. E. Seagrave, Assistant Attorneys General, for the Treasurer and Receiver General.

T. N. Perkins & B. L. Young, for the individual respondents.

RUGG, C. J. 1. The first question presented is whether certain promissory notes executed by a copartnership known as Bliss, Fabyan and Company to the order of Cornelius N. Bliss and owned and kept by him in New York, the State of his domicil, are subject to a succession tax in this Commonwealth, he having deceased, testate, a resident of New York in October, 1911. Bliss, Fabyan and Company, the makers of the notes, were at the date of the death of the testator, wholesale dry goods merchants with offices in the cities of Boston, New York and Chicago. The testator, a resident of New York, was the senior partner, one other partner was domiciled in New York, one in Chicago and two in Massachusetts. The copartnership articles of Bliss, Fabyan and Company in effect on the date of the testator's death provided that the death of any partner should not dissolve the partnership, so far as concerned the other partners, but that the surviving partners should carry on the business with the right to use the firm name and be entitled to its good will. The accounts of the New York and Boston offices of the copartnership were kept separately,

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the Chicago office being treated as a branch of the New York office, complete records of the firm being kept only in Boston. Under the laws of the State of New York action could have been brought in that State upon the notes of the copartnership held by the decedent, and judgment had for the amount due on the notes. There were at the time of the death of the testator assets of the copartnership in the State of New York applicable to the satisfaction of such a judgment sufficient in amount to meet the same, and the notes could have been collected by the estate of the testator in New York without the aid of the courts of this Commonwealth. The notes were in fact paid by checks drawn and signed in Boston and mailed to the executors of the testator in New York. The notes also were drawn and made payable in Boston.

The governing statute is St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1, (the death of the decedent having occurred before the enactment of St. 1912, c. 678,) which provides that "all property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will . . . shall be subject to a tax. . . ."

We are of opinion that these notes are not subject to the tax. They were not physically within the Commonwealth at the time of the death of their owner. They were the property of an owner who was not a resident of this Commonwealth but who was domiciled in a sister State. Promissory notes are intangible property. The *situs* of such property commonly is at the domicil of its owner. The extent of the power of a State, whatever it may be, to declare the *situs* of such property physically within its borders for the purpose of levying a tax on it, *Buck* v. *Beach*, 206 U. S. 392, *Wheeler* v. *New York*, 233 U. S. 434, is not involved here because the notes were not in this Commonwealth at the time of the death of their owner. If it be assumed that the *situs* of a simple debt may be declared by the sovereign power to be at the domicil of the debtor, that does not control the decision of the point now presented. The maker of these notes was a partnership. It had a place of business, ample assets to meet the obligations, and a resident partner within the State of New York upon whom legal service could be made binding enough property of the partnership,

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to secure the payment of the notes. There was no occasion for the creditor to resort to our courts to give validity to the notes. The creditor did not and did not need to depend upon our law for the collection of his debt. The circumstance that for some purposes the office of the partnership in Boston was treated as its principal or home office, has no decisive effect. It was not the place to which the creditor was required to come to collect his debt. Nor does the fact that the notes were made in Boston and were payable there necessarily give them a *situs* for taxation purposes in Massachusetts. *State Tax on Foreign-held Bonds*, 15 Wall. 300. The mere accident that for other reasons the executors of the will of the owner of these notes resort to our courts does not of itself confer jurisdiction to impose a succession tax on these notes. The doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, does not reach to a case like the present. The tax sought to be collected is a succession tax. It is apparent that the succession of these notes or their proceeds does not depend under the circumstances here disclosed in any degree upon the moral or legal support or actual assistance of our laws. The sovereign power of this Commonwealth could not by any effort reach to the persons of the copartnership in such way as to prevent, or regulate practically in any particular, the succession of these notes, or their proceeds, when collected, from the debtor to the estate of the testator or from that estate to the legatees. New York has complete jurisdiction over the notes both because physically they are there and the owners, the executors, are domiciled there, and because the partnership maker of the notes has one of its usual places of business, a large amount of its property and the domicil of one of its members in that State. The law of Massachusetts does not need to be invoked in any respect. The sanction of the law of New York alone gives completion to the succession from its beginning to its end. Hence, without considering other aspects of this contention, there is no sound foundation for any succession tax in this Commonwealth. This conclusion is in harmony with *Matter of Gordon*, 186 N. Y. 471.

2. The next point to be decided is whether a registered bond of the Commonwealth owned by a non-resident and kept at his domicil is subject to the succession tax. That point never has been decided in this Commonwealth. As to bonds in general, it was

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referred to and left open in *Kinney* v. *Treasurer & Receiver General*, 207 Mass. 368. In that case it was said by Knowlton, C. J., at page 369, respecting our succession tax law: "This language indicates an intention on the part of the Legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the Commonwealth." See also *Peabody* v. *Treasurer & Receiver General*, 215 Mass. 129. That must be accepted as the meaning of the tax act in the case at bar.

It was held in *Blackstone* v. *Miller*, 188 U. S. 189, that for the purpose of a succession tax a simple debt and a deposit in a trust company were property within the jurisdiction of New York, which was the State of the debtor although the creditor was a non-resident. It there was said: "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. . . . But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. . . . Power over the person of the debtor confers jurisdiction." It is not necessary to determine whether that declaration of law can be wrested from its application to the facts of a simple debt, then before the court, and made applicable broadly to debts manifested by bonds or notes. The peculiar circumstance of a registered bond of the State itself differentiates the case at bar from that general class. Applying the test quoted above from *Blackstone* v. *Miller* to the registered bond of the Commonwealth, it results in holding it subject to the transfer tax. The Commonwealth cannot be sued on the bond in the federal courts. Article 11 of the Amendments to the United States Constitution. The Commonwealth can be impleaded only in its own courts. R. L. c. 201. *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137. *Smith* v. *Reeves*, 178 U. S. 436. The bond could not be collected by any process in the courts except by invoking Massachusetts law. The bond being registered can only be transferred by bringing it to the proper registration officer of this Commonwealth and there complying with the law of the Commonwealth respecting transfer of registration.

It follows from the fact that this is a registered bond of the

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Commonwealth that it must be registered in accordance with R. L. c. 6, § 74, which requires that the Auditor and the Treasurer and Receiver General shall keep a register of the "dates, numbers and amounts, the names of the persons to whom they were issued" and that other like bonds may be issued by the treasurer in substitution for any such "indorsed bonds presented to him." They therefore are made payable to a particular individual. They are not negotiable in the ordinary sense and can be transferred only after indorsement by surrender to the State treasurer and the issue of new bonds in place of those indorsed and surrendered. See *Benwell* v. *Newark*, 10 Dick. 260, 263.

Since the tax is upon succession to property, it may be levied by the State where the succession of necessity must take place; or in other words, where alone the effectual transfer of the legal title, as manifested by the essential factor of change of registration, can be consummated. *Keeney* v. *New York*, 222 U. S. 525, 537. Complete *indicia* of legal title does not pass to the purchaser of such a bond except by transfer by registration. Simple delivery or indorsement is not sufficient to transfer an absolute ownership in the sense that no further act is required to perfect the right of the purchaser. *Herbert* v. *Simson*, 220 Mass. 480.

The executors of the decedent owner could not enforce the recognition of a transfer by change of registration of the bond except by resort to our courts. They would have no authority to do this except by ancillary appointment by the courts of this Commonwealth. *Goodwin* v. *Jones*, 3 Mass. 514. The fact that the Commonwealth was debtor would give jurisdiction for such appointment. For the purpose of giving jurisdiction for the appointment of an administrator of the estate of a non-resident creditor, debts are assets at the domicil of the debtor. *Pinney* v. *McGregory*, 102 Mass. 186. *Wyman* v. *Halstead*, 109 U. S. 654. Diversity of citizenship alone would not confer upon the executors of the will of the testator a right to prosecute an action in the courts of the United States sitting in this State, until ancillary administration had been taken out in the courts of this State, even apart from art. 11 of the Amendments to the Federal Constitution. *Johnson* v. *Powers*, 139 U. S. 156. In this regard the federal courts follow the practice of the State courts. *Hayes* v. *Pratt*, 147 U. S. 557, 569. From every point of view, the resort must be had to the juris-

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diction of this Commonwealth in order to perfect a transfer of the bond.

That there is no insuperable objection to the separation of the obligation to pay from the instrument itself, and to its localization at the domicil of the debtor is shown by *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395. In that case the notes or other paper evidences of indebtedness were kept without the jurisdiction of the taxing State and yet it was held that they had a business *situs* in the State of the debtor.

To pursue the distinction between the case at bar and *State Tax on Foreign-held Bonds*, 15 Wall. 300, pointed out by Mr. Justice Hughes in *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, at page 355, the bond in question was not executed, delivered and made payable outside the State, but in a peculiar sense by reason of registration the State retained a kind of jurisdiction over it. "If locality, in the sense of subjection to sovereign power, could be attributed" under any circumstances to such an instrument as a registered State bond, it could be localized in Massachusetts by reason of the facts already dwelt upon. As was further said at page 354, "The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement." Under all the conditions here presented, there is a *situs* for the purpose of succession in the State issuing the bond. *Kinney* v. *Treasurer & Receiver General*, 207 Mass. 368. *Rothschild* v. *Knight*, 176 Mass. 48, 54. See 15 Columbia Law Rev. 377.

It is urged against this result that, sound as it may be as to simple debts, it cannot prevail as to bonds on the ground stated by Mr. Justice Holmes in *Blackstone* v. *Miller*, 188 U. S. 189, at page 206, in these words: "Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335." Or as it was put in *New Orleans* v. *Stempel*, 175 U. S. 309, 322, 323: "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner. . . .

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Notes and mortgages are of the same nature. . . . We see no reason why a State may not declare that if found within its limits they shall be subject to taxation." The peculiar characteristics of bonds again are referred to and emphasized in *Wheeler* v. *New York*, 233 U. S. 434, 439, *Selliger* v. *Kentucky*, 213 U. S. 200, 204, and *Buck* v. *Beach*, 206 U. S. 392, 403, 413.

However forceful this argument might be as to notes and bonds completed title to which passes by delivery, or which may be enforced without resort to the State courts, we think that it is not applicable where the transfer cannot become effective without bringing the bond into this jurisdiction and submitting it to the inspection and registration of the officers of the State or compelling the performance of these duties by aid of State courts. To this extent the main doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, governs the case at bar.

There seems to us to be nothing inconsistent with this conclusion in *State Tax on Foreign-held Bonds*, 15 Wall. 300, as it has been narrowed by later cases. In that decision "considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases." Mr. Justice Holmes, in *Blackstone* v. *Miller*, 188 U. S. 189, at page 206. Moreover, it is to be remembered that "The succession or inheritance tax is not a tax on property, as has been frequently held." *Buck* v. *Beach*, 206 U. S. 392, 408. A succession tax may be upheld when a property tax could not stand. Nor do we regard *Matter of Bronson*, 150 N. Y. 1, and *Matter of Fearing*, 200 N. Y. 350, as inconsistent with this conclusion. In those cases it was held under a succession tax law similar in this respect to our own, that bonds of a domestic corporation owned by a non-resident and kept by him at his domicil, and which do not appear to have been registered, were not subject to succession tax in New York. That question is not presented in the case at bar and is left quite open, to be decided on its merits when it arises.

3. The next point for decision is whether this bond is exempt from taxation under that part of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, which provides that, "Property of a non-resident decedent which is within the jurisdiction of the Commonwealth at the time of his death, if subject to a tax of like

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character with that imposed by this part by the law of the State or country of his residence, shall be subject only to such portion of the tax hereby imposed as may be in excess of such tax imposed by the laws of such State or country; provided, that a like exemption is made by the laws of such other State or country in favor of estates of citizens of this Commonwealth, but no such exemption shall be allowed until such tax provided for by the law of such other State or country shall be actually paid, guaranteed, or secured in accordance with law."

It is conceded by all parties that a tax on successions is imposed by the State of New York, the domicil of the decedent, and that under the law governing the succession tax in that State, all tangible personal property of a non-resident in New York is subject to the tax and all intangible property, including bonds, of a non-resident within that jurisdiction is not subject to the tax. This provision is general and quite independent of any correlative concession by other States. N. Y. St. 1911, c. 732, §§ 220, 243.

It is contended in behalf of the Treasurer and Receiver General that this failure on the part of New York to attempt to tax in any instance the succession on intangible property of a deceased non-resident is not a compliance with the terms of our exemption clause. The argument in substance is that, in order that it fairly can be said that "a like exemption is made by the laws of such other State . . . in favor of estates of citizens of this Commonwealth," there must be a law of that other State imposing a succession tax on all intangible property of deceased non-residents within its jurisdiction, with a special exemption from such tax in favor of estates of citizens of other States whose laws impose a like general tax with like special exemption. In effect this contention is that the statute should be construed as would an offer to sell, which must be accepted in exactly categorical terms without variation or shadow of change before it can become operative. We are of opinion that the statute should not be interpreted so narrowly, but should be given a more liberal construction. Its manifest purpose is to avoid duplication of taxation on the same succession by different States. Although this kind of double taxation violates no constitutional guaranty, the hardship of it has been recognized. Indeed, the inconsistency on the part of a sovereign State in taxing both according to the fact of power in one class of cases and in another

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class of cases according to the fiction that the place of intangible personal property for taxation purposes follows the person of the owner, and hence that domicil of the owner settles the whole matter, has been pointed out. *Blackstone* v. *Miller*, 188 U. S. 189, at page 205. Moreover, the advantage of comity between the several States touching taxation laws so that a general system might prevail, harmonious in its principles and avoiding taxation of the same property in two jurisdictions has been suggested and is manifest. *Kidd* v. *Alabama*, 188 U. S. 730. Our statute should be interpreted in the light of the evil at which it was aimed and the purpose intended to be accomplished. The words "like exemption" in our statute are satisfied by the terms of the New York statute. Said Chief Justice Shaw in *Houghton* v. *Field*, 2 Cush. 141, 145: "'Like' does not necessarily mean the same in all particulars, but rather the contrary." "Like" in this connection does not imply identity but only similarity. It does not import coextensiveness in every detail, but only a resemblance in its salient features. See also *Hopkins* v. *Benson*, 21 Maine, 399; *United States* v. *Wallace*, 116 U. S. 398, 400. "Exemption" as applied to taxation signifies an immunity or freedom from that pecuniary burden. The New York statute covers the same general subject of taxation on successions as does our act. It is of "like character." It defines the classes of property to which it applies. It omits the particular kind of property here involved. That is as much an exemption in a broad sense as would be a comprehensive general phrase with certain denominated exceptions. The resulting freedom from taxation would be accomplished in one way as well as in the other. Although the New York law and our own are not exactly commensurate and coterminous in every respect as to property of a non-resident not made subject to the succession tax, yet as New York would not impose a succession tax on property exactly like that here in question and in New York in the same sense as this is in Massachusetts, if it belonged to a deceased resident of Massachusstts, we are of opinion that the descriptive words of our statute "like exemption" are satisfied. To the same effect is the well reasoned opinion in *State* v. *Davis*, 88 Kans. 849.

4. The shares of stock of Massachusetts corporations which belonged to the deceased are property within the jurisdiction of this Commonwealth and liable to be made subject to the suc-

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cession tax. *Greves* v. *Shaw*, 173 Mass. 205. *Kennedy* v. *Hodges*, 215 Mass. 112, 114. But for the reasons already stated under paragraph three of this opinion, since they would not be taxed in New York if belonging to a deceased resident of Massachusetts, the estate of the deceased resident of that State is entitled to a like exemption here.

It follows that the decree of the Probate Court must be reversed and a new decree entered to the effect that the notes are not subject to the tax, and that the registered bond of the Commonwealth and the stock of the Massachusetts corporations are liable to the tax, but by reason of the special exemption shall be subject only to such portion of the tax imposed by our act as may be in excess of the succession tax imposed by the law of New York.

So ordered.

BERTRAM H. BORDEN & others, executors, *vs.* TREASURER AND RECEIVER GENERAL & others.

Bristol. March 17, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions.

Shares of capital stock of Massachusetts corporations owned by one domiciled in another State at the time of his death were subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1; and, where it appeared that by the laws of that State and under the decision in *Bliss* v. *Bliss*, *ante*, 201, a "like exemption" was made in favor of citizens of this Commonwealth to that given to non-residents by St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, such shares were subject only to such portion of the tax as was in excess of the tax imposed by the laws of that State.

RUGG, C. J. Matthew C. D. Borden died domiciled in New York on May 27, 1912, leaving an estate which consisted in part of stock in Massachusetts corporations. As the death occurred two days before St. 1912, c. 678 went into effect, the succession tax on his estate is governed by St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1. Under that statute the stock of a non-resident decedent in Massachusetts corporations was sub-

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ject to a succession tax. By reason of the provisions of the New York succession tax law (which in general imposes a tax of like character as does our statute), relieving the estate of a deceased non-resident, including a deceased resident of Massachusetts, from a succession tax on shares owned in New York corporations, the estate of the deceased resident of New York owning shares in Massachusetts corporations is entitled to the exemption provided in our succession tax law. This case is governed by the decision just rendered in *Bliss* v. *Bliss, ante,* 201, argued with the case at bar, where the reasons are set forth at length.

The decree of the Probate Court was right and is

Affirmed.

C. F. Rowley, for the executors, was present but did not address the court.

W. H. Hitchcock & A. E. Seagrave, Assistant Attorneys General, for the Treasurer and Receiver General.

J. F. Jackson & F. T. Field, for the respondents Bertram H. Borden and others.

MARY E. JONES *vs.* EDWARD C. DONNELLY.

Suffolk. March 18, 1915. — May 20, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Contract, Implied. *Pleading, Civil,* Declaration. *Words,* "Let."

To recover in an action for the use and occupation of real estate the plaintiff must prove that the relation of landlord and tenant existed between him and the defendant.

Where a tenant at will of real estate by reason of a conveyance of the premises by the landlord becomes a tenant at sufferance, he is not liable for rent until he has notice of the conveyance.

An agreement by the owner of a building "to let to" a certain bill poster "the location of roof" on the building, "Fence to be forty feet long for one year . . . the same to be used for the purpose of fence bill posting and general advertising, and to continue as long as one year said location is used for advertising purposes," nothing objectionable to be painted upon the signs and the bill poster "to assume all liabilities that may be caused by erection of said fence," and to construct a plank walk upon the roof, which is to remain the property of the owner of the building, does not create a relation of landlord and tenant between

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the owner and the bill poster, but is merely a contract concerning a permit or license for the use of the roof; and therefore, after use of the premises by the bill poster, neither the owner nor one to whom he conveys his rights in the premises can maintain against the bill poster by reason of the agreement an action for use and occupation of the premises.

The mere use of the word "let" in an agreement granting a right or privilege to occupy a roof for bill posting purposes does not make the agreement a lease nor create the relation of landlord and tenant between the parties to the agreement.

CONTRACT "for rent" in the sum of $546 and interest according to an account annexed, which set forth a claim "for the use of premises at 309 Tremont Street, Boston, from May 1, 1908, to August 1, 1913." The action originally was brought in the name of Mary E. R. Jones, the plaintiff's mother. Writ in the Municipal Court of the City of Boston dated September 10, 1913.

On removal to the Superior Court, the case was tried before *Hitchcock*, J. It appeared that up to February 15, 1906, the premises in question were owned by the plaintiff's mother, who had made with the defendant the agreements in writing described in the opinion for the use of the roof. She conveyed the premises to the plaintiff by a deed dated February 15, 1906, acknowledged on May 3, 1909, and recorded on May 8, 1909. The plaintiff testified that she was the owner of the premises from the date of the deed, but that she never told the defendant that she had become the owner because she wanted her mother to take pleasure in having it understood that she still owned the property. The defendant did not know before the action was brought that the plaintiff claimed to be the owner of the premises.

No agreements were made between the plaintiff's mother and the defendant as to the use of the premises in question except those described in the opinion as "the written contracts of 1896 and 1899."

There was conversation between one Keene, an agent of the defendant, and the plaintiff's mother in February, 1908, relating to a reduction in the amount to be paid for the use of the roof. Afterwards there was correspondence between them on the same subject. A letter to the defendant, dated November 5, 1908, written by the plaintiff and signed by her, read as follows: "I do not accept your check upon the terms contained in your receipt, but have credited the same upon your account and must insist

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upon your sending me a check for the balance to February 1st, 1909. The check received pays to May 1st, 1908."

The other material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings among others:

"1. On all the evidence the plaintiff is not entitled to recover and your verdict must be for the defendant.

"2. The relation of landlord and tenant did not exist between the plaintiff and the defendant.

"3. The defendant's standing in law under the original written instrument was merely that of a licensee and not that of a tenant."

The rulings were refused. The judge in his charge gave among others the following instructions to the jury:

"In this case there is nothing to show that there was any express agreement made between the defendant and the present plaintiff; . . . but the claim is made here that the defendant continued to occupy with no change and that in view of that fact the jury are asked to infer that it continued under the same terms as previously existed, in so far as it may appear that the present plaintiff knew about those terms.

"It may be said to be a general principle of law that in the case of a continuation of a tenancy after the previous tenancy has expired in any proper form, it may be inferred, in the absence of other evidence to control it, that the tenancy continues on substantially the same terms as existed before, especially so far as it may be shown that the new owner, or the owner of the premises, and the tenant were cognizant with and knew what those terms were before the termination of the tenancy. It may be conceded, perhaps, in this case that by the continuation on the part of the defendant of the occupancy of this part of the house for maintaining signs, and the using of them, it would be a continuation on his part of a tenancy of some kind; and by the bringing of this action the plaintiff claims that there was a tenancy existing between herself and the defendant, and the important question comes now as to the terms under which that tenancy continued; there being no express agreement, then the tenancy is implied, and it is for the jury to say from all the evidence in the case what the terms were of the new tenancy, and that includes what would be fair rental therefor.

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"In the case of an implied tenancy, what would be the rental of these premises would be a question of fact to be determined, and that would be determined with reference to what would be a fair and reasonable rent for such occupancy."

The defendant excepted to so much of the charge as said it might be conceded that by a continuation of the occupancy of the roof a tenancy of some kind was created, and that it might be inferred that the tenancy continuing after the sale of the property was on the same terms as before.

There was a verdict for the plaintiff in the sum of $652.07, of which the plaintiff afterwards remitted all but $569.85; and the defendant alleged exceptions.

J. M. Maloney, for the defendant.

K. Howes, (*L. G. Brooks* with him,) for the plaintiff.

CARROLL, J. The plaintiff sues for the use and occupation of a roof used for advertising purposes, and her right to recover in this form of action depends upon whether the relation of landlord and tenant existed between herself and the defendant. *Central Mills Co.* v. *Hart*, 124 Mass. 123. *Kirchgassner* v. *Rodick*, 170 Mass. 543. *Rogers* v. *Coy*, 164 Mass. 391. Keener on Quasi-Contracts, 191, 192.

If the defendant at the termination of his contract with the plaintiff's mother became a tenant at will, as argued by the plaintiff, and was such when Mary E. R. Jones, the mother, conveyed the real estate in question to the plaintiff, and the defendant thereby ceased to be a tenant at will and became a tenant at sufferance, even then the plaintiff is not entitled to recover, for the reason that a tenant at sufferance under these circumstances is not liable for rent until he has had notice of the transfer; and from the record it appears that no such notice was ever given him. *Dixon* v. *Smith*, 181 Mass. 218.

In the written contracts of 1896 and 1899 between the defendant and the plaintiff's mother, who was then the owner of the premises, it is agreed "to let to John Donnelly and Sons . . . the location of roof 309 Tremont St Fence to be forty feet long for one year . . . the same to be used for the purpose of fence bill posting and general advertising, and to continue as long as one year said location is used for advertising purposes." The fence to remain the property of the defendant, who was "to assume all liabilities that may be caused by erection of said fence." It was further

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agreed that nothing objectionable should be painted on the signs and that the defendant should construct a plank walk on the roof, which was to remain the property of Mary E. R. Jones.

This agreement did not give to the defendant the exclusive possession of the roof. The possession of it was retained by the owner of the premises and she had the right to use it and occupy it for all purposes not inconsistent with the terms of the contract. She remained liable to travellers on the highway for injuries caused by negligence in the care of the roof, to the same extent as any other landlord is liable, who retains the possession and control of the premises. The defendant had merely a right or privilege to occupy the roof, under the owner, and he was therefore not a tenant, but a licensee.

In *Lowell* v. *Strahan*, 145 Mass. 1, where an agreement was made for an annual payment, allowing a sign to remain on the outside wall of a building, it was construed to be a license and not a lease, and in the opinion of the court W. Allen, J., uses this language: "It was permission to do a particular act, namely, to affix a sign to the wall, and gave no authority to do any other act upon the premises. . . . Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further. A lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms." The relation of the defendant to the owner would be the same under the agreement before us, if instead of giving him the right to maintain a sign on the roof, it gave him the right to use the entire outside wall of the premises for that purpose. In either case he could not exclude the landowner from the premises as a tenant could in whom the exclusive possession remains during the term of the tenancy.

Nor is the word "let" in the agreement of controlling significance. We speak of letting quarters to a lodger when the lodger is merely a licensee and not a tenant, *White* v. *Maynard*, 111 Mass. 250; or letting a hall on certain days, *Johnson* v. *Wilkinson*, 139 Mass. 3; *Oxford* v. *Leathe*, 165 Mass. 254; or receiving "rent" when the owner of a bar room gives to another the right to carry on a restaurant on the premises, *DeMontague* v. *Bacharach*, 181 Mass. 256; or letting a specified place in a stable for the keeping of a horse and vehicle, *Congregation Beth Israel* v. *O'Connell*, 187 Mass. 236;

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or leasing a location in a department store for the sale of music, *R. H. White Co.* v. *Remick & Co.* 198 Mass. 41.

The written agreements of 1896 and 1899 were nothing more than permits or licenses by the owner of the building to the defendant, to go upon the roof and construct the fence or sign to be used for advertising purposes. These agreements conveyed no title or interest in the building or in any part of it. The dominion, control and possession of the estate were not given up by the landowner, and the rights of the parties were derived entirely from the written contract and are governed thereby. *Reynolds* v. *Van Beuren*, 155 N. Y. 120. *Roberts* v. *Lynn Ice Co.* 187 Mass. 402.

There being no relation of landlord and tenant subsisting between the parties or between the defendant and the plaintiff's mother, the former owner, the count for the use and occupation will not lie and the plaintiff cannot recover in this form of action.

As these exceptions must be sustained, we do not consider the requests of the defendant relating to other aspects of the case; nor do we consider what other remedy, if any, the plaintiff has against the defendant.

Exceptions sustained.

IDA BENNETT, administratrix, *vs.* TREMONT SECURITIES COMPANY & another.

Suffolk. April 1, 1915. — May 20, 1915.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Small Loans. Bills and Notes, Validity. *Contract*, Implied. *Equity Jurisdiction*, Unjust enrichment.

If, after St. 1912, c. 675, § 5, went into effect, providing that a note purchased in violation of the small loans act by a person not licensed under that act shall be void, such an unlicensed person in a transaction which was subject to the provisions of the act accepted a note in place of another note which was valid and was given to him before the act took effect, the note so received by him is void and he cannot maintain an action upon it; but in a proper action or suit he can recover the amount still due upon the debt for which he received the note.

In this case, such recovery was had in a suit in equity, no question of jurisdiction having been raised by demurrer or otherwise.

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BILL IN EQUITY, begun as an action of contract by a writ dated November 13, 1913, and by amendment changed to a suit in equity on April 24, 1914.

The bill alleged that the defendant company was engaged in the business of making small loans under the provisions of St. 1911, c. 727, as amended by St. 1912, c. 675; that certain notes given to it by its customers were sold to the plaintiff's intestate after indorsement by the company and its treasurer Gale, as stated in the opinion; that some of these notes were paid and some were renewed by the giving of other notes before St. 1912, c. 675 went into effect, and three of them were renewed further by the giving of further notes after that statute went into effect, such further notes being those described in the opinion as A, B and C. The bill sought either the enforcement of the notes A, B and C, or the renewal and enforcement of the original notes upon the surrender of which the last named notes were given, or for an accounting and adjudication of what was due to the plaintiff by reason of the transactions between the defendants and the plaintiff's intestate.

The suit was heard by *Jenney*, J., who filed a memorandum stating, among other facts found by him, those described in the opinion. He also found that it "was admitted that the plaintiff, if entitled to recover at all, is entitled to recover the entire amount of the notes herein referred to according to the tenor thereof."

Upon his order a decree was made that the plaintiff have judgment against the defendants for the amounts of the notes with interest thereon at the rate of six per cent per annum from the date of the maturity of each, in all $749.15, and for costs. The defendants appealed.

The case was submitted on briefs.

C. S. Hill & L. Marks, for the defendants.

C. W. Rowley & D. J. Riley, for the plaintiff.

CROSBY, J. No question of jurisdiction having been raised by demurrer or otherwise, we proceed to consider the case upon the merits.

The plaintiff seeks to recover the amounts of three promissory notes executed and delivered to her intestate by the defendants, the defendant company being the maker of the notes and the defendant Gale being the payee who indorsed them to the intestate.

In February, 1912, and for a considerable period before that time,

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the defendant company was engaged in the business of making loans of $300 or less, and was licensed to carry on that business as required by St. 1911, c. 727. The defendant Gale, during all the time covered by the transactions involved in this suit, was the treasurer of the company. The judge of the Superior Court before whom the case was tried found that the plaintiff's intestate, during this period, was in the business defined in St. 1911, c. 727, but was not licensed as required by its provisions. The plaintiff's intestate hereafter will be referred to as the plaintiff.

The judge further found that on February 2, 1912, the plaintiff purchased of the company the six notes first described in the bill; that these notes had been taken by the company in the course of its business; that no one of them was made by either defendant, but that all were indorsed by both defendants upon their delivery to the plaintiff. Because of their payment, none of these notes is material to any issue involved excepting one for $368.50, which became due on May 15, 1912. On that date it was surrendered to the company and a new note was given to the plaintiff for the same amount, signed by the company and indorsed by the defendant Gale. The judge finds that "when the note so given in place of the first note became due, a note for the same amount and signed by the same parties was given to the plaintiff, and the note given prior thereto surrendered, and this course was pursued from time to time until August 1, 1913." Shortly before August 1, 1913, the sum of $150 was paid on this note, leaving a balance due of $218, for which the note dated August 1 (Exhibit A) was given by the defendants.

On February 21, 1912, the plaintiff purchased four other notes of the company, two of which afterwards were paid. The other two, namely, one for $200, became due May 15, 1912, and the other, for $300, became due June 15, 1912. The defendants were not the makers of these notes, but indorsed them upon their delivery to the plaintiff. When the two notes last above referred to became due, they were surrendered to the company, and the plaintiff received in place thereof new notes signed by the company and indorsed by the defendant Gale. When these notes became due they were surrendered, and other notes for the same amounts, signed by the same parties, were given to the plaintiff from time

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to time until the notes (Exhibits B and C) were given upon July 12 and July 19, 1912, respectively.

The plaintiff, not being licensed under St. 1911, c. 727, was carrying on a business contrary to its provisions. Such a violation of the law was subject to fine or imprisonment or both (§ 17), but there was no provision in the statute which affected or impaired the validity of loans made or notes purchased in violation of its terms. This statute took effect on July 19, 1911, and therefore was in force when the first purchases of all the notes in question were made. This statute prohibits (*inter alia*) any one without a license engaging in the business of making loans of $300 or less if the amount to be paid on any such loan for interest or expenses exceeds twelve per cent per annum. Afterwards St. 1912, c. 675, was enacted, which amended St. 1911, c. 727, and contained, among other provisions, the following (§ 5): "Any loan made or note purchased, or indorsement or guarantee furnished by an unlicensed person, partnership, corporation or association in violation of this act shall be void." This act took effect on June 29, 1912.

The judge further found that when these three notes, copies of which are annexed to the bill, were given, the company paid to the plaintiff, as interest in advance thereon, an amount equal to one and one half per cent a month on the principal sums for the terms therein stated. The judge also found that "When the various notes, referred to herein as notes given upon the maturity of other notes, were delivered, although said notes were written without interest, the plaintiff was paid, by the company, interest in advance thereon at varying rates, never less than one and one half per cent per month."

These findings make it plain that the notes described in the bill as Exhibits A, B and C are all void. They were all purchased since St. 1912, c. 675, took effect, and are clearly in violation of its terms.

The notes which were originally purchased by the plaintiff were not signed by the defendants or either of them. As to these notes the defendants were indorsers, but as there is no evidence to show that any demand for payment ever was made upon them, or that they ever received any notice of the dishonor of these notes, they are not liable as indorsers.

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The notes given upon surrender of the original notes were dated respectively May 15, 1912, May 15, 1912, and June 15, 1912. These notes were all signed by the company and indorsed by the defendant Gale, and all subsequent notes were in the same form. When these notes were given they were valid, outstanding obligations because the St. of 1912, c. 675, had not taken effect; but all of the notes given after June 29, 1912, including Exhibits A, B and C, were made void by the statute. In this Commonwealth, while the surrender of a note and the taking of a new note in lieu of the former one is in the absence of any evidence of the intention of the parties to the contrary, presumed to be an extinguishment and payment of the old note, still this presumption of payment may be rebutted by evidence to the contrary. *Adams* v. *Jenkins*, 16 Gray, 146.

While the plaintiff is not entitled to recover upon the notes described in the bill, still, as the original notes and those afterward given by the defendants to the plaintiff before June 29, 1912, were valid and enforceable obligations, we are of opinion that the defendants cannot avoid paying to the plaintiff so much as still was due of the original consideration received by them. They cannot be allowed to escape the payment of a debt originally valid and collectable because under the statute the last notes are void. This rule has been uniformly applied where the new note was void for usury. *Ramsdell* v. *Soule*, 12 Pick. 126. *Walker* v. *Mayo*, 143 Mass. 42.

While the plaintiff is not entitled to recover upon the notes for the reasons stated, she is entitled to be paid the original consideration which the defendants have received from the plaintiff's intestate, which is the amount of the notes with interest at six per cent per annum from the dates of the maturity of each. The decree entered in the Superior Court is to be affirmed with costs.

So ordered.

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FRED W. RAY *vs.* REGISTRARS OF VOTERS OF ASHLAND.

Suffolk. November 9, 1914. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Elections. Ballot.

There being no express statutory provision to the contrary, a voter's designation on the official ballot of his choice for a certain office by pasting over a name regularly placed upon the ballot a slip containing the name of a person not nominated by any party and then placing a cross in the appropriate blank opposite the name, while irregular, is not illegal, and the ballot properly may be counted as a vote for the person named on the slip.

Where such election was for the choice of selectmen for a term of three years, the words "three years" placed after the name printed on the slip do not as a matter of law constitute a mark upon the ballot by which it may be identified, as described in St. 1913, c. 835, § 295, nor render the ballot invalid.

Such a ballot properly may be counted for the man whose name appears upon the paster, although only the capital letters that begin his Christian and surname and his middle initial are printed in type conforming to the requirements of St. 1913, c. 835, §§ 280, 258, 261, as to size and character of the letters.

PETITION, filed on April 9, 1914, for a writ of mandamus directing the respondents, the board of registrars of voters of the town of Ashland, to reject certain ballots cast at an election held in the town on March 2, 1914, for the choice of selectmen for the term of three years and to certify to the town clerk the election of the petitioner.

The case was heard by *Hammond*, J. He found the following among other facts:

The petitioner was a candidate for the office of selectman on nomination papers and his name was duly printed upon the official ballot. One Charles T. Dearborn also was a candidate for the office of selectman, but had not been nominated by any party, nor had his name been printed upon the official ballot. Many voters inserted the name of Dearborn upon their ballots either by writing in his name in the blank space left at the end of the list of candidates for selectmen, or by the use of pasters placed in such blank spaces.

Upon the face of the election returns made by the election offi-

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cers Dearborn had a plurality of six votes. A petition for a recount of the ballots was filed and the respondents recounted the ballots and found and determined that Dearborn had received one hundred fifty-nine votes, and that the petitioner had received one hundred forty-five votes. Among the ballots counted by the respondents for Dearborn were eighteen pasters which had printed upon them the name of Charles T. Dearborn and were placed over the name of the petitioner in the space on the official ballot where the petitioner's name was printed. The cross in the square at the right of each such paster was counted for Dearborn. The name of Charles T. Dearborn, wherever it appeared upon the pasters, except for the first letter of his Christian name, the middle initial and the first letter of his surname, was not printed in capital letters, and the type in which it was printed was less than one eighth of an inch in height. The pasters in addition to the name of "Charles T. Dearborn, Cherry Street," had printed upon them the words "three years."

The single justice ruled that the eighteen ballots with pasters placed over the name of the petitioner, which did not have the candidate's name in all capital letters nor in letters not less than one eighth of an inch in height, and which had after the name the words "three years" printed upon them, were all properly counted for Charles T. Dearborn; and, upon such findings and ruling ordered the petition dismissed and at the request of the petitioner reported the case for determination by the full court.

The case was argued at the bar in November, 1914, before *Rugg*, C. J., *Hammond, Braley, De Courcy, & Crosby*, JJ., and afterwards was submitted on briefs to all the justices constituting the court.

J. P. Dexter, for the petitioner.

E. L. McManus, for the respondents.

BRALEY, J. It appears that, the opponent of the petitioner for the office of selectman for the term of three years not having been nominated by any party, his name was not printed on the official ballot. While many voters, either in writing or by the use of pasters, inserted his name in the blank space provided therefor at the end of the list of candidates, these votes seemingly were insufficient to insure his election, and the petitioner is entitled to the office unless the eighteen pasters placed over the

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petitioner's name in the space where his name appeared, and the cross made in the square opposite thereto, were properly counted for his opponent whose name they bore.

The cardinal rule is, that "if the intent of the voter can be fairly determined, effect shall be given to that intent and the vote counted in accordance therewith." *Flanders* v. *Roberts*, 182 Mass. 524, 525, 526, and authorities cited. And his intention is to be found from the evidence of what he did. If not prohibited by statute, ballots which fairly and unmistakably express the voters' purpose are to be counted as deposited in the ballot box. *O'Connell* v. *Mathews*, 177 Mass. 518, 521. *Brown* v. *McCollum*, 76 Iowa, 479. *State* v. *Eagan*, 115 Wis. 417. The original act of 1888, c. 436, § 23, as amended by St. 1889, c. 413, provided that the voter could fill in the blank space on the ballot with the name of the candidate of his choice; but in the codification of the election laws in St. 1893, c. 417, § 162, this wording was so changed as to read "by inserting the name of the candidate of his choice." It was said in *Cole* v. *Tucker*, 164 Mass. 486, 488, where the use of the official ballot by the voter was under discussion, that "the acts permit the voter to vote for such persons as he pleases by leaving blank spaces on the official ballot in which he may write or insert in any other proper manner the names of such persons." The blank space is as appropriate for the insertion of a printed slip as of a written name, and under this statute and subsequent revisions the use of pasters, while not expressly, is impliedly recognized. St. 1898, c. 548, § 224. R. L. c. 11, § 227. St. 1907, c. 560, § 260. St. 1913, c. 835, § 292, as amended by St. 1914, c. 435. We find no express provision, however, in St. 1913, c. 835, prohibiting the voter, if he chooses such mode of exercising his right, from placing a written or printed slip bearing the name of another person over the name of a candidate, and voting for that person by making a cross in the appropriate blank opposite the name. The designation may be irregular but it is not illegal. *Coughlin* v. *McElroy*, 72 Conn. 99. *Tandy* v. *Lavery*, 194 Ill. 372. It is not a "spoiled ballot," which under § 296 the voter can exchange for a fresh ballot, nor is the paster itself a distinguishing mark used by the voter, subjecting him to the penalty of imprisonment under § 453. *People* v. *Shaw*, 133 N. Y. 493, 497, 498. The cases cited by the petitioner are not in conflict with this view. In *Whittam* v. *Zahorik*,

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91 Iowa, 23, and *Van Winkle* v. *Crabtree*, 34 Ore. 462, the ballots plainly showed marks by which the voter could be readily identified, while in *Fletcher* v. *Wall*, 172 Ill. 426, the use of pasters was prohibited by statute. *Apple* v. *Barcroft*, 158 Ill. 649, and *Kelly* v. *Adams*, 183 Ill. 193, determined that two straight marks through the circles and squares on a printed ballot were not crosses; and that a cross to the right of the name of a candidate, between such name and the square opposite the name of an opposing candidate, did not sufficiently show the intention of the voter, and that a ballot marked only by pencil erasures of all the names on one ticket could not be counted; and that a ballot not officially endorsed by the judge of election was not a ballot within the statute and that the ballot in question, which bore two sets of crosses over the printed names of eight of the candidates for office, with a nondescript mark shaped like a large hook upon one of the crosses, contained distinguishing marks.

A further review is unnecessary. The decisions as to what constitute marks which invalidate the ballot depend upon the construction of local statutes and are not uniform, but we have found none exactly similar to the case at bar. See 15 Cyc. 357, 358, 359, and notes.

The election, as we have said, was for the choice of selectmen for three years and other town officers for the ensuing year. The words, "three years," appearing on the paster after the name of the person voted for correctly stated the term of office required by the official ballot. St. 1913, c. 835, §§ 406, 407. If a distinguishing mark is the use by the voter of numbers, letters, characters or symbols by which he can be identified and how he voted determined, the words of themselves do not disclose the voter's identity and whether by some pre-arrangement or understanding they were deliberately so intended was a question of fact upon which the finding for the respondents by the single justice is conclusive. *Voorhees* v. *Arnold*, 108 Iowa, 77. *Kelso* v. *Wright*, 110 Iowa, 560. *Boston Supply Co.* v. *Rubin*, 214 Mass. 217, 220. If it be suggested that the blank spaces enable the voter to insert the name of any person not printed on the ballot, § 259 reads that those spaces are left in which "the voter may insert" such names. The statute does not say that he must use this mode of expressing his will or his ballot is defective. If the

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construction by implication the petitioner urges is adopted, he gets an office to which he has not been elected, unless the will of a majority of the voters at an election, where no fraud or misconduct appears or is claimed, is nullified, a result wholly inconsistent with the spirit of our election laws. The Legislature, if it intended to restrict the voter to the use of the blank spaces alone, should have directed in appropriate language that this was the only way in which the voter could express an independent choice.

The petitioner also relies on *Miner* v. *Olin*, 159 Mass. 487, as having decided that the voter no longer can prepare his own ballot except by the insertion of names in the spaces left blank. But the only questions there considered were the constitutionality of the provisions of St. 1893, c. 417, relating to caucuses and the placing of names of candidates not thus nominated on the official ballot by the Secretary of the Commonwealth. It must be borne in mind that our laws relating to elections are enacted not merely to preserve the purity and secrecy of the ballot and to curb in so far as possible corrupt practices, but to ascertain and not to thwart the popular will honestly expressed. *Blackmer* v. *Hildreth*, 181 Mass. 29, 31.

The St. of 1913, c. 835, § 280, provides that pasters which are to be placed on the official ballot shall conform as to names, residences and political designations of candidates and the size of the type in which the names shall be printed with the requirements of §§ 258 and 261, where the names of all candidates not here material "shall be in capital letters not less than one eighth of an inch nor more than one quarter of an inch in height." The single justice having found that the name on the pasters was not in conformity with the statute, except as to the initial letters of the name printed thereon, the petitioner further contends that for this reason these ballots are defective. If the voter had chosen to write or even print in the blank space the name of the person for whom he desired to vote, followed by a cross in the appropriate space, the ballot would have been counted under St. 1913, c. 835, § 292, although the size of the letters used did not conform with the requirement of § 261. *Cole* v. *Tucker*, 164 Mass. 486, 488. It would follow from the petitioner's view, that if the voter chooses to use a slip on which the name had been similarly printed with the appropriate designation, the ballot is defective

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because the letters are not of statutory size. Or in other words, the first class of voters can have their votes counted, while those using the second mode practically are disfranchised, which, in the opinion of a majority of the court, cannot be reached under the statute. *O'Connell* v. *Mathews*, 177 Mass. 518, 521.

The statute, as to all the questions raised, being directory and not mandatory, the board of registrars rightly counted these ballots, and the petition by the terms of the report is to be dismissed. *Sewall* v. *Jones*, 9 Pick. 412, 414. *Torrey* v. *Millbury*, 21 Pick. 64, 67. *Green* v. *Holway*, 101 Mass. 243, 248. *Taunton* v. *County of Bristol*, 213 Mass. 222, 224.

So ordered.

JOSEPH W. HANSON *vs.* ADELINE W. GRISWOLD & others.

Suffolk. January 18, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Equity Jurisdiction, To enjoin foreclosure of mortgage, Declaratory decree. *Equity Pleading and Practice*, Decree. *Deed*, Delivery. *Estoppel.*

In a suit in equity to enjoin the foreclosure of a mortgage of real estate, a contention of the plaintiff, that the mortgage whose foreclosure he seeks to enjoin never was delivered, is not supported by the evidence, where it appears that, although certain of the mortgagees did not know until long after the mortgage was made that it had been taken in their behalf, yet the beneficial owner of the property, who was one of two trustees that were named as mortgagees, had authority to act to accept the mortgage both as trustee and as the agent of the other mortgagees and accepted it for all.

In a suit to enjoin the foreclosure of a mortgage of real estate, where it appears that the former beneficial owner of the land, who as agent had procured the execution of the mortgage to the defendants, afterwards caused the land to be conveyed to the predecessor in title of the plaintiff, representing that he had authority to cause it to be so conveyed and that no such mortgage had been made, this misrepresentation does not estop the defendants from proceeding with the foreclosure of their mortgage, if it further appears that the plaintiff's predecessor in title when he accepted the conveyance thought that he was dealing only with the beneficial owner as an individual and dealt solely with him.

In a suit to enjoin the foreclosure of a mortgage of real estate, where the plaintiff, besides praying for an injunction, had added to his bill a prayer that an underlying mortgage, which had been discharged upon a conveyance of the land to the predecessor in title of the plaintiff with a representation that there was no such mortgage as that to the defendant, might be revived in favor of the

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plaintiff, it was *held*, that the additional prayer in effect asked the court to make a declaratory decree stating that the release of the underlying mortgage operated as an assignment of that mortgage and that the rights of the assignee had come to the plaintiff, that on the bill to enjoin the foreclosure of the junior mortgage no relief founded on such a declaration could be granted, and that a court of equity has no jurisdiction to make a declaratory decree on which no relief can be based.

LORING, J. This is a bill in equity to enjoin the foreclosure of a mortgage. The case is here on a report.* From the report it appears that on March 4, 1902, a mortgage was executed by James Walker on a lot of land on Rutland Square in Boston on which the Hotel Exeter was erected. The mortgagees were Adeline W. Griswold, William E. Stowe and Henry L. Morse, (trustees of the estate of William F. Homer,) and Mary D. Stowe. The mortgage secured three notes signed by the grantor, one to Mrs. Griswold for $5,800, a second to Stowe and Morse (trustees as aforesaid) for $2,500, and a third to Mrs. Stowe for $1,500. James Walker was a man of straw. The real owner of the mortgaged property at that time was William E. Stowe. William E. Stowe acquired title in the name of Walker to the land on which the Exeter was erected (hereinafter spoken of as parcel A) and to a small lot adjoining it (hereinafter called parcel B) by a deed from Thomas G. Washburn dated March 1, 1902, and recorded March 3, 1902. The mortgage here in question was dated March 4, 1902, and recorded March 6, 1902. At this time Stowe was acting as attorney for Mrs. Griswold and for Mrs. Stowe. At the time of the trial Stowe was dead and Washburn (who testified as a witness) did not have a clear recollection of the transaction.

It would seem from the facts stated in the report that Stowe acquired title to lots A and B (which he had put in the name of Walker) by a conveyance of two parcels of land, one on Ward Street in Newton and the other on Irvington Street in Waban. The land on Ward Street in Newton was owned by Mrs. Stowe and by William E. Stowe and Morse (trustees as aforesaid) in the proportions of $1,500 and $2,500. Just what interest Mrs. Griswold had in the Waban property is not very clear, but the judge found "that William E. Stowe, acting for Adeline W. Griswold,

* Made by *Fessenden*, J.

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had received $4,000 on the sale of property on Irvington Street, Waban, on which she originally had a mortgage for $5,500, and that Stowe intended to secure Mrs. Griswold for what she had parted with by the mortgage in question on Hotel Exeter." The finding in effect is a finding that Stowe, thinking himself under obligations to Mrs. Griswold to the extent of $5,800, and using the property of Mrs. Stowe and that owned by himself and Morse as trustees in acquiring parcels A and B from Washburn, had caused Walker to execute the mortgage here in question to secure notes for the amounts to which the three persons named were entitled. The judge further found "if the evidence justifies it," that Stowe kept the title of the Exeter in the name of Walker "in order to protect himself for sums which he had paid out of his own pocket to preserve the properties of the" mortgagees. He made this further finding: "It did not appear that any of the mortgagees other than William E. Stowe knew at the time of the transaction or thereafter that said Stowe had taken such a mortgage on their behalf until Mr. Norcross, attorney for Mrs. Griswold, learned of the existence of the same." The son of Mr. Stowe, one of the defendants in this case who succeeded his father as trustee under the will of William F. Homer, testified that "he did not find the Walker mortgage or mortgage notes among his father's papers at his death." No demand ever was made on Walker for payment of the note during his lifetime, nor was any claim ever made on the estate of Walker, who since has deceased and on whose estate an administrator was appointed. On March 11, 1903, (that is to say, about a year after the execution of the mortgage) Mrs. Griswold revoked her power of attorney to Stowe and appointed Otis Norcross and Grenville H. Norcross as her attorneys in his place. Otis Norcross testified that "he had never seen the original Walker mortgage or notes." He further testified that in 1903, when he took over the affairs of Mrs. Griswold, he had the Hotel Exeter appraised by experts, and that, acting on their report, he decided that the mortgage here in question was worthless, and that he continued of that opinion until shortly before the present foreclosure proceedings were begun. When parcels A and B were conveyed by Washburn to Walker they were subject to a first mortgage to a savings bank for $20,000 and a second mortgage to S. L. Whipple, Esquire, originally for $8,000

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but then reduced to $5,000. In September, 1904, Washburn (who conveyed parcels A and B to Walker), acting for the second mortgagee, Whipple, threatened to foreclose the second mortgage. Washburn testified and the judge found that Stowe told Washburn that he would convey the Hotel Exeter back to him (Washburn) to save the trouble of foreclosure proceedings, and that, in answer to a question then put to him by Washburn, Stowe said that the title was then the same as at the time of the conveyance from Washburn to Walker in 1902, and that no other incumbrance had been put on the premises. Pursuant to this arrangement Walker, on September 13, 1904, conveyed parcel A to Washburn. In that connection the judge made this finding: "I find that on the occasion when he [Washburn] sold the property to Stowe in 1902 title being taken in Walker's name and when he received the title back in 1904 he thought that he was dealing with William E. Stowe as an individual." The judge further found that this misrepresentation made by Stowe was relied upon by Washburn in taking the reconveyance from Walker in place of foreclosing the Whipple mortgage.

The judge found that Mrs. Griswold, by any act of her own, had not released, discharged or parted with the security she obtained by virtue of the mortgage from Walker, and that Stowe had no power or authority to act for her after March 11, 1903, but that Mrs. Griswold or her attorney Norcross knew in 1903 that Stowe was managing the Hotel Exeter as a building, and was endeavoring to effect a sale of it. He further found that Mrs. Stowe had not released, discharged or parted with the security she obtained by virtue of the mortgage, by any act of her own. He added: "There is no evidence of the extent of William E. Stowe's authority to act for her [Mrs. Stowe] or that such authority was ever terminated prior to her death September 16, 1904."

On June 14, 1905, Washburn, "in ignorance of the existence of the mortgage in suit," paid to Whipple the second mortgage note originally made by him, and thereupon that mortgage was discharged and released and the discharge and release were recorded on July 19, 1905. Later, $5,000 of the $20,000 secured by the first mortgage was paid by "some one or more of the plaintiff's predecessors in title." Since the deed from Walker to Washburn there have been five transfers and four mortgages of parcels

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A and B. The plaintiff is the owner by an unrecorded deed from the last of the five grantees mentioned above.

The bill of complaint alleges that the defendants Adeline W. Griswold (one of the original mortgagees), Griswold Stowe (now trustee under the will of William F. Homer), and Ellen G. Stowe (executrix of the will of Mary D. Stowe) have advertised parcel A for sale under the power of sale contained in the mortgage given by Walker to Mrs. Griswold and to Stowe and Morse, trustees, and to Mrs. Stowe, to secure the several sums of $5,800, $2,500 and $1,500. In consequence of the institution of these foreclosure proceedings the bill of complaint here in question was filed.

The first ground on which the plaintiff contends that he is entitled to have the foreclosure proceedings enjoined is that the so called mortgage which the defendants are attempting to foreclose never was intended as a mortgage, but was an instrument put on record to hide Stowe's ownership of the property. But the judge found that this instrument "was what it purported to be and was intended by William E. Stowe individually and as agent and trustee, and by James Walker, to be a mortgage securing definite sums, namely, the interests of the respective persons for whom he acted, as stated in the mortgage." We are of opinion that this finding was justified by the evidence set forth in the report and not only that, but on that evidence that it was correct. That disposes of the first contention.

The second contention of the plaintiff is that there was no evidence of delivery of the mortgage deed. This contention is based on the finding that "it did not appear that any of the mortgagees other than William E. Stowe knew at the time of the transaction or thereafter that said Stowe had taken such a mortgage on their behalf until Mr. Norcross, attorney for Mrs. Griswold, learned of the existence of the same." But under the findings of the judge, Stowe, as attorney for Mrs. Griswold and for Mrs. Stowe, had authority to accept the mortgage so far as they were concerned, and as trustee under the will of William F. Homer he had authority to accept it so far as he and his fellow trustee Morse were concerned. Under these circumstances there is nothing in the cases of *Barnes* v. *Barnes*, 161 Mass. 381, *Meigs* v. *Dexter*, 172 Mass. 217, *Loring* v. *Hildreth*, 170 Mass. 328, *Gilson* v.

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Gilson, 2 Allen, 115, or *Burnett* v. *Pratt*, 22 Pick. 556, which affects this question.

The next contention of the plaintiff is that the defendants are estopped from asserting their rights under the mortgage because of the misrepresentation made by Stowe when Washburn, their predecessor in title, accepted a reconveyance from Stowe in place of foreclosing the Whipple mortgage. But it was found by the judge that "on the occasion when he [Washburn] sold the property to Stowe in 1902 title being taken in Walker's name and when he received the title back in 1904 he thought that he was dealing with William E. Stowe as an individual," and further, "that Washburn dealt solely with Stowe in procuring this deed" in place of foreclosing the Whipple mortgage. The representation therefore was made by Stowe in his own behalf, not in behalf of himself as trustee under the will of Mr. Homer, or in behalf of the two individual mortgagees Mrs. Griswold and Mrs. Stowe. In that respect the case is different from *Nickerson* v. *Massachusetts Title Ins. Co.* 178 Mass. 308, relied upon by the plaintiff.

It follows from what has been said that the plaintiff is not entitled to have the defendants enjoined from proceeding with the foreclosure sale which they have begun.

In addition to the prayer for an injunction restraining the foreclosure sale, the plaintiff inserted in his bill of complaint the following prayer: "That it be decreed that the mortgage formerly held by said Whipple and which was discharged by reason of the representations of said William E. Stowe and the said James Walker as aforesaid, be revived in favor of the said plaintiff to take precedence over the mortgage now held by the said defendants." The plaintiff's contention on this prayer for relief is that under the circumstances under which it was executed the release of the Whipple mortgage will be treated in equity as an assignment and not as a release. If that be so, and if it be true that the plaintiff has succeeded to Washburn's right to have the release of the Whipple mortgage stand as an assignment of it, the plaintiff's remedy is to foreclose that mortgage as the assignee of it. Whether he has a right to foreclose that mortgage as the assignee of it is not in issue in this suit. What the plaintiff (by the additional prayer set forth above) in effect asks the court to do is to enter a

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declaratory decree stating that the release of the Whipple mortgage operated as an assignment of that mortgage and that that mortgage now has come to the plaintiff. But on this bill no relief can be granted to the plaintiff on that declaration of his rights, if he is entitled to it. Where all that is sought by a plaintiff is a declaratory decree not the subject of relief to be based upon it, there is no jurisdiction in equity and the bill must be dismissed. To that effect see *Baylies* v. *Payson*, 5 Allen, 473. In *Baylies* v. *Payson* relief could be given upon the declaration of rights which the plaintiff sought, and for that reason, and that reason alone, the bill was retained, although no prayer for relief had been inserted in the bill. See also in this connection *Price* v. *Minot*, 107 Mass. 49.

Whether a bill can be framed on which some relief can be given to the plaintiff in respect to the Whipple mortgage is not a matter now before the court. So far as the present bill relates to the Whipple mortgage it should be dismissed without prejudice, and so far as the rest of the bill is concerned it must be dismissed on the merits. It is

So ordered.

C. N. Barney, (*H. A. Murphy* with him,) for the plaintiff.

R. Homans, for the defendants.

FREDERICK E. GOODRICH, executor, *vs.* THEODORA G. HENDERSON & others.

Suffolk. January 21, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Devise and Legacy. Conflict of Laws. Guardian, Ad litem. Equity Pleading and Practice, Costs.

A testatrix, who was survived by her husband, provided by her will that from the income of the residue of her property there should be paid $300 a year to her two aunts and the survivor of them, and then provided as follows: "All the rest and residue of my estate, of every kind and nature, I give to my husband, [naming him] for his life, and I empower him to use the principal of said estate for any purpose which he may deem expedient. Upon the death of my said husband, or in case he shall not survive me, so much as may remain of said

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residue shall be divided into three equal parts, of which I give one to each of my children." *Held*, that until the death of both aunts the husband of the testatrix could not exercise his power of spending and consuming the principal to such an extent that the remaining principal would not produce $300 a year; but that, subject to this charge, he had the right during his lifetime of spending and consuming the principal for any purpose which he in good faith deemed expedient.

Upon a bill for instructions as to the construction of the will of a testatrix, who at the time of the execution of her will was a resident of another State but at the time of her death was a resident of this Commonwealth where her will was proved, it was not necessary to decide by the law of which State the language of the will was to be interpreted, because in regard to the question to be passed upon the law of the two States was the same.

Upon a bill for instructions the executor of a will is entitled to be instructed only as to matters in regard to which it is his duty to act at the time the bill is filed.

A guardian *ad litem* appointed by the court is entitled to have his expenses ordered to be paid out of the fund claimed by the litigants.

Where in a suit in equity by an executor for instructions the meaning of the will is so plain that there was no sufficient reason for the contending defendants to have insisted upon the opinion of this court being asked for, costs as between solicitor and client will not be allowed out of the fund to the defendants whose plainly untenable contentions made it necessary for the executor to bring the bill for instructions.

BILL IN EQUITY, filed as a substitute bill in the Supreme Judicial Court on December 31, 1914, by the executor of the will of Elizabeth P. Goodrich, late of Boston, who was the wife of the plaintiff and died in the year 1911, her will having been proved on September 7 of that year, for instructions as to the powers and duties of the plaintiff as executor and as legatee.

The will of the testatrix, after pecuniary legacies to the three children of the testatrix (two sons and a daughter) and to other persons, disposed of the residue of her estate as follows:

"4. From the income of the balance of my estate, I direct the payment of Twenty-five dollars ($25.00) per month to my two aunts, Mary C. Stebbins and Lucy B. Stebbins, of Springfield Mass., jointly, during their natural lives, or to the survivor of them.

"5. All the rest and residue of my estate, of every kind and nature, I give to my husband, Frederick E. Goodrich, for his life, and I empower him to use the principal of said estate for any purpose which he may deem expedient.

"6. Upon the death of my said husband, or in case he shall not survive me, so much as may remain of said residue shall be divided into three equal parts, of which I give one to each of my children. If, at the termination of this life estate, any of

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my children be dead, leaving a widow surviving, then his share is to go to his widow for life, with remainder over to his children."

The case came on to be heard before *Pierce*, J., who reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

The case was submitted on briefs.

T. J. Barry & D. Harris, for the plaintiff.

W. H. Shea, for the defendants Harold B. and David P. Goodrich.

T. F. Burns, guardian *ad litem* of contingent interests.

LORING, J. The plaintiff is entitled under the will of his wife to the income of the residue of her property during his life, with a power of spending and consuming the principal subject to the charge, amounting to $300 a year, in favor of the two aunts of the testatrix until the death of the survivor of them. Until the death of both aunts the plaintiff cannot exercise his power of spending and consuming the principal so that the remaining principal will not produce $300 a year. Subject to that he has the right during his lifetime to spend and consume the principal for any purpose which he in good faith may deem expedient.

It is pointed out by the plaintiff's sons (two of the three defendants) that (1) in *Woodbridge* v. *Jones*, 183 Mass. 549, and in *Ford* v. *Ticknor*, 169 Mass. 276, the testator used the words "use and dispose;" that (2) in *Cummings* v. *Shaw*, 108 Mass. 159, *Smith* v. *Snow*, 123 Mass. 323, *Taft* v. *Taft*, 130 Mass. 461, *Collins* v. *Wickwire*, 162 Mass. 143, and in *Knight* v. *Knight*, 162 Mass. 460, the testator used the word "dispose," and that (3) in *Kuhn* v. *Webster*, 12 Gray, 3, the words used were "sell, exchange, alter or otherwise dispose of." There is nothing technical in the matter now before us. Any words are sufficient which show that it was the intention of the testator that the life tenant should have a power of spending and consuming the principal in addition to the income during his life. It is plain that in connection with the gift over of "so much as may remain of said residue" the provision here in question ("I empower him to use the principal of said estate for any purpose which he may deem expedient") gave the life tenant the power stated above of spending and consuming the principal. The case is covered by *Allen* v. *Hunt*, 213 Mass. 276. See also in this connection *Kent* v. *Mor-*

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rison, 153 Mass. 137; *Dodge* v. *Moore*, 100 Mass. 335. The matter is too plain to require a careful collection of the authorities.

The plaintiff's two sons have placed much reliance upon *Glover* v. *Stillson*, 56 Conn. 316, and on *Security Co.* v. *Hardenburgh*, 53 Conn. 169, on the ground that the testatrix was a resident of Connecticut when the will was executed although she was a resident of this Commonwealth when she died. We do not find it necessary to decide which State is to be looked to in such a case, because there is nothing in these two cases which is in conflict with our own decisions. This is so plainly evident that it is not necessary to go into them in detail.

There is nothing in the agreed facts which affects the construction which must be given to the will without reference to them.

The other questions argued are not on matters with respect to which the executor has to act at the present time, and therefore are not questions upon which the plaintiff is entitled to the instructions of the court. See for example *Bullard* v. *Chandler*, 149 Mass. 532; *Peabody* v. *Tyszkiewicz*, 191 Mass. 317; *Bailey* v. *Smith*, 214 Mass. 114.

There was no sufficient reason for the defendants insisting upon the opinion of the full court being taken. The guardian *ad litem* having been appointed by the court, his expenses must be paid. But no other costs or allowances out of the fund are to be made by the court. Nothing which we have said is to be taken to prevent the plaintiff paying his expenses of this litigation out of the principal of the fund.

Ordered accordingly.

RANDOLPH H. BOYNTON *vs.* AMERICAN EXPRESS COMPANY.

Hampden. March 2, 1915. — May 21, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Carrier, Of goods: limitation of damage. *Express Company.*

Where a driver of an express company calls at a house for a trunk and receives the trunk from a person with whom its owner has left it to deliver to the expressman when he calls for it, and that person takes from the driver a receipt containing a clause limiting the damage to be recovered in case of loss to $50

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unless the value is declared at the time of shipment, and, upon the driver asking for the value of the trunk and its contents, the person delivering the trunk to him requests him to obtain the information from the owner at his office, whereupon the driver takes away the trunk without making further inquiry, if the express company fails to deliver the trunk at its destination, and the owner brings an action against the express company for such failure to deliver the trunk, in which it appears that neither the owner of the trunk nor his servant who delivered it to the driver read the receipt or knew of the limitation of damage until after the trunk was lost, this failure to read the limitation in the absence of fraud or concealment renders the contract of shipment none the less binding on the owner, and the express company is entitled to rely on the limitation of damage.

In the action above described it does not help the plaintiff that the driver's failure to call at the owner's office may have prevented a declaration of value, because the driver was under no obligation to do this and did not agree to do it, and, if he had so agreed, had no authority to waive any portion of the contract.

CONTRACT for a failure to deliver a trunk and its contents entrusted to the defendant as a common carrier on September 18, 1912, at Portland in the State of Maine for transportation to West Springfield in this Commonwealth, the alleged value of the trunk and its contents being $298.73. Writ dated March 3, 1913.

The second count, referred to in the opinion, was upon an alleged promise of the defendant to pay to the plaintiff the value of the trunk if it was not found at the expiration of a reasonable time, in consideration of the plaintiff's forbearance for a reasonable time from bringing his action while the defendant was searching for the trunk.

The defendant in its answer relied upon a provision, in the receipt containing the contract of carriage, limiting its liability as follows: "nor in any event shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of Fifty Dollars upon any shipment of 100 lbs. or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value." The answer further alleged that the defendant on January 30, 1913, before the plaintiff sued out his writ, tendered to the plaintiff the sum of $53 and that it now brought that sum of money into court for the plaintiff.

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In the Superior Court the trial of the case was begun before *Irwin*, J. The plaintiff was allowed to discontinue as to the second count of his declaration. The parties then filed an agreed statement of facts, upon which the judge ordered a verdict for the plaintiff in the sum of $245.73, and at the request of the parties reported the case for determination by this court. If the ordering of the verdict was wrong, judgment was to be entered for the defendant; otherwise, judgment was to be entered upon the verdict with interest from the date of the writ. The essential facts are stated in the opinion. The agreed statement of facts contained the statement, "Neither the plaintiff nor Annie Olson read the receipt nor did either of them know that it contained a limitation of liability or agreed valuation until after the trunk was lost."

The case was submitted on briefs.

C. H. Beckwith, for the defendant.

R. A. Bidwell, for the plaintiff.

BRALEY, J. The agreed statement of facts on which the presiding judge directed a verdict for the plaintiff is not within the St. of 1913, c. 716, § 5, permitting inferences of fact by this court, and the question presented by the report is, whether as matter of law on the evidence submitted the verdict should stand or judgment should be ordered for the defendant. *Norton* v. *Brookline*, 181 Mass. 360. *Bullock* v. *Haverhill & Boston Dispatch Co.* 187 Mass. 91.

The defendant is engaged in an interstate express business, and received the plaintiff's trunk at Portland, Maine, for transportation to West Springfield in this Commonwealth. The trunk and its contents having been lost in transit, no delivery has been made, and the plaintiff, having discontinued as to the second count of the declaration, relies upon the first count, which alleges that the defendant as a common carrier is liable in damages for breach of the contract. We assume, in the absence of any argument to the contrary, that the common law of the place of contract is the same as the law of the forum, and the measure of recovery, therefore, rests upon the terms of the contract of shipment. *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104. *Hooker* v. *Boston & Maine Railroad*, 209 Mass. 598. *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97.

It is agreed that the plaintiff instructed one Annie Olson, in

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whose possession and control the trunk had been left, "to deliver the trunk to the expressman when he called for it." The defendant's driver called, but at whose request does not affirmatively appear, when the trunk was delivered without the charges being prepaid, and the receipt described in the record was given and accepted. It contained a clause limiting the company's liability to a fixed sum for non-delivery, if the true value was not declared at the date of shipment, and, no declaration appearing, the defendant upon the face of the contract is not responsible in excess of this amount. *Bernard* v. *Adams Express Co.* 205 Mass. 254, 258. *Peirce* v. *American Express Co.* 210 Mass. 383. *Johnson* v. *New York, New Haven, & Hartford Railroad,* 217 Mass. 203.

The plaintiff however maintains that he is not bound by the limitation, because the driver when he took the trunk and gave the receipt, having asked for the value and being requested to make inquiry of the plaintiff at his office, should have complied, and his failure to inquire having prevented a declaration of value, the defendant received the trunk "as an insurer for full value."

But the driver had no authority to waive any portion of the contract, nor did he, in fact, assent to the request or direction of the plaintiff's representative, or become her messenger. It is unnecessary under the circumstances to decide whether the plaintiff could recover, if the receipt is entirely displaced or ignored. If the plaintiff was ignorant of its terms until after the trunk had been lost, he did know of them when the action was brought. While no express reference thereto is found in the declaration, the only contract declared on is unmistakably shown by the agreed facts to be the contract within the four corners of the receipt. The parties plainly did not deal upon the assumption and understanding that the contract was to be partly oral and partly in writing, as in *Davis* v. *Cress,* 214 Mass. 379, 382. And the delivery of the trunk and receipt were concurrent. The failure to read it, where no fraud or concealment by the defendant appears, does not estop the company from reliance on all of its terms. *Graves* v. *Adams Express Co.* 176 Mass. 280, 282. It follows that the plaintiff is bound by the contract made in his behalf by his servant or agent. *Edgar* v. *Joseph Breck & Sons Corp.* 172 Mass. 581. *Partridge* v. *White,* 59 Maine, 564. And having accepted the receipt, which contained no valuation, he cannot

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avail himself of the benefit of the contract and ignore the limitation inserted for the defendant's protection.

A tender of the amount due having been made before suit, and the money paid into court, judgment is to be entered for the defendant. R. L. c. 174, § 12.

So ordered.

EDWIN R. JUMP, trustee, *vs.* NAPOLEON BERNIER & others.

Suffolk. March 3, 1915. — May 21, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Assignment, Of earnings. *Bankruptcy*, Unlawful preference.

Under St. 1909, c. 514, §§ 125, 126, as amended by St. 1910, c. 563, in regard to the recording of assignments of future earnings, whether the last named statute was repealed by implication by St. 1911, c. 727, §§ 22, 25, or not, an assignment by a building contractor of "whatever balance may be due me on my contract with" certain trustees of an unincorporated association "for alterations upon [a certain building] up to the amount of $900," when at the time of the assignment $1,800 is due to the assignor from the trustees and the assignment is given with the knowledge and assent of the trustees, is not an assignment of "future earnings" and no statute requires that it should be recorded.

In a suit in equity by a trustee in bankruptcy to avoid as an unlawful preference an assignment of a debt made by the plaintiff's bankrupt within four months before the filing of his voluntary petition in bankruptcy, where there is no definite evidence to show the value of the assets of the bankrupt at the time of the assignment and the evidence in regard to the amount of his debts at that time is still more vague, so that it cannot be ascertained whether the bankrupt's property at a fair valuation would have been at that time sufficient in amount to pay his debts, it cannot be found that the bankrupt was insolvent at the time he made the assignment, and therefore no unlawful preference under the provisions of the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 11, is shown.

BILL IN EQUITY, filed in the Superior Court on October 9, 1913, by the trustee in bankruptcy of the estate of David F. Burns against Napoleon Bernier of Somerville and Kenneth G. T. Webster and Edith F. Webster, his wife, of Cambridge, — Alfred Bowditch and others as the trustees of the University Associates, an unincorporated association, also being made defendants by an amendment filed on December 2, 1913, — to set aside an order

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or assignment made by Burns, the plaintiff's bankrupt, to the defendant Bernier on April 7, 1913, within four months before the filing by Burns of a voluntary petition in bankruptcy on May 28, 1913, on which he was adjudicated a bankrupt.

The case was heard by *Jenney*, J., who made a finding of material facts which he reported under R. L. c. 159, § 23, the evidence being reported by a commissioner appointed by the judge under Equity Rule 35. The judge made a final decree setting aside the order or assignment of Burns to the defendant Bernier dated April 7, 1913, as a preference against the creditors of Burns, and enjoining the defendant Bernier and the defendants Kenneth G. T. Webster and Edith F. Webster from enforcing the order against the defendants Bowditch and others as trustees of the University Associates. The defendants Webster and the defendant Bernier appealed.

F. T. Hammond, for the defendants Kenneth G. T. and Edith F. Webster.

D. H. Fulton, for the defendant Bernier.

W. H. Thorpe, for the plaintiff.

PIERCE, J. From the commissioner's report of the testimony it indisputably appears that on May 27, 1912, the defendant David F. Burns who then was, had been since 1877, and until May 28, 1913, continued to be a large contractor and builder, entered into a contract with the defendant Kenneth G. T. Webster to build a house for Webster's wife, for the sum, with certain allowances and extras, of $26,436.20; and that thereafter, in July, 1912, Burns became a party to several subsidiary subcontracts. Among the subcontracts was that of the defendant Bernier, who therein undertook to furnish the labor and material necessary to lath and plaster the house for the sum of $2,735.

As regards the other subcontracts, no reported testimony shows their number, their nature, the names of the party contractors, the original money consideration, or whether all or any of these contracts had been fully performed or the parties thereto discharged of their several obligations.

Shortly before April 7, 1913, Burns's business got into such a state that it was impossible for him to continue to go on with the Webster contract. The house was then nearly completed. There had been paid to him on his contract directly, or to subcontrac-

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tors on his order, $24,016.75, and there was a balance under the contract of $2,419.45, to be paid upon the completion of the contract.

Under the provisions of Article V of the Webster contract the architect, one Ames, was authorized and empowered to certify to the owner the fact of the happening of certain enumerated defaults in the contractor's performance of his contract, among others, failure "to prosecute the work with promptness and diligence." Upon receipt of such a certification the owner would become at liberty to terminate the employment of the contractor and to proceed to complete the contract at the contractor's expense in the manner detailed in the article.

Walter G. Burns, the only son of the defendant Burns and his financial and business manager, acting with authority in his father's behalf in this business, went to see the architect, Ames, concerning Burns's situation in reference to the Webster contract. As a consequence of the interview the son then called at the office of Webster's attorney and there saw and talked with Franklin T. Hammond, Esquire, who was authorized to act as attorney for the defendants Webster but not for the defendant Bernier. In reply to Mr. Hammond's questions Burns told him his father could not complete the Webster contract. He (Burns) gave him (Hammond) the names of the subcontractors on that job, the amounts of their respective contracts and the several sums remaining unpaid upon each of them; he also stated that he was unable to meet the weekly pay roll, and gave to Mr. Hammond a list of the workmen other than those in the employ of the subcontractors, with the amounts due them; and Mr. Hammond thereafter paid them. Mr. Hammond asked if there was any way in which it could be arranged to pay what was owed to some of the contractors, and was told of the work that was being done and that the only money that could be come at was upon a contract that was almost completed for the University Associates. Mr. Hammond then asked if Burns, senior, would be willing to give the defendant Bernier an order for $900, to be drawn on the University Associaties and to be applied to his account. Burns stated that his father would be willing to give Bernier an order for $900, to be applied to his account if it was satisfactory to Mr. Parker, who was one of the trustees of the University Associates.

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On the next day, Mr. Hammond, meanwhile having seen Mr. Parker, handed to Burns a typewritten assignment or order in tenor following:

"Know all men by these presents, That I, David F. Burns, of Cambridge, Massachusetts, in consideration of $1.00 and other valuable considerations hereby assign to Napoleon Bernier of Somerville, Massachusetts, whatever balance may be due me on my contract with the trustees of the University Associates for alterations upon the building numbered 1234 Massachusetts Avenue, Cambridge, up to the amount of nine hundred dollars, ($900) it being understood that this assignment is subject to a prior assignment given the William H. Wood Company and to my right or the right of the said trustees to pay out of the money coming due out of said contract the unpaid bills for labor and materials now or hereafter furnished for that particular job but for no other.

Witness my hand and seal this 7th day of April, A.D. 1913.

David F. Burns (Seal)."

Burns took the assignment or order to his father and returned it to Mr. Hammond after his father had signed it. Without conference or any pre-arrangement with Bernier and without Bernier's knowledge that any such act was contemplated, Mr. Hammond sent the assignment or order on the following day (April 9, 1913) to Bernier, with an accompanying letter couched in these terms:

"Dear Sir:

I hand you herewith an assignment and an order for the payment of $900 out of the money coming due me upon the job which I am doing for the University Associates in Cambridge. I give you this order and assignment on the understanding that the amount collected upon it is to be applied in reduction of the amount due from me to you for the work which you have done and may do upon the house of Mr. Kenneth G. T. Webster in Cambridge, Massachusetts.

(Enclosures)"

Bernier received the assignment or order without knowledge, so far as appears, of Burns's insolvency, and without reason to

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believe that the effect of the transfer would be to enable him or any other creditor of Burns to obtain a greater percentage of his debts than any other of such creditors of the same class. At this time there remained unpaid to Bernier upon his subcontract $2,282. The contract was not fully performed, but how much had been done and how much remained to be done cannot be determined even approximately. Bernier himself was not in any default. The Bernier subcontract contained no provision relating to the time of payments, but Burns, junior, testified that "he [Bernier] was to be paid from time to time as we received our payments on the work."

After the sending of the order and letter of April 9, 1913, no other letter or communication was had with Bernier until at some time within a week thereafter, Burns, junior, saw him and related to him the circumstances of Burns's giving the assignment. Thereupon Bernier said he would not complete the job; he was not going to do any more until he had been secured for the money that was due him. At the end of the week following the date of the assignment, Burns stopped work on the Webster house, and on April 22, 1913, Webster, acting under a certificate from the architect, formally terminated his contract with Burns.

After the termination of the contract Bernier completed his work under his contract, under a new arrangement with Webster, and thereafter brought a petition to enforce a lien upon the house and lot, which petition now is pending. On April 22, 1913, the day Webster terminated his contract with Burns, he (Webster) entered into an agreement with Bernier to complete the work remaining to be done by Bernier under his contract with Burns, and as a part thereof made a collateral agreement relative to the assignment as follows:

"Memorandum. April 22, 1913.

"Mrs. Webster loans Mr. Bernier $500 payable when the work on the Webster house now being done by Bernier is completed. At that time Mr. Bernier will present his claim for lien on the Webster work and will file it if desired. He will then give a discharge of his claim for lien, and his lien, upon the payment to him by Mr. Webster of the amount of his lien.

"Mr. Bernier now has an order for $900 on the trustees of the

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University Associates given him by Burns in part payment for his work on the Webster house. He agrees to apply the sum collected on this order in reduction of his claim for lien, and lien, if the order is collected before his work on the Webster house is completed. If not he agrees to assign to Mr. Webster the order aforesaid for the sum of $900.

N. Bernier."

On April 7, 1913, when the work for the University Associates although not completed yet was substantially so, there was due to Burns $1,800, from which the assignment subject to other assignments could be paid. On May 28, 1913, David F. Burns filed a voluntary petition in bankruptcy and was duly adjudicated a bankrupt on June 27, 1913. The trustees assert, and the defendants deny, that the assignment is an assignment of future earnings, and not being recorded is not valid under the provisions of R. L. c. 189, § 34.

R. L. c. 189, § 34, was expressly repealed by St. 1909, c. 514, § 145, and a new provision limited in terms to "future wages" was enacted by §§ 125, 126 of that act. This statute in turn was amended by St. 1910, c. 563, by striking out the word "wages" and inserting in place thereof the word "earnings." The word "earnings," by the express re-enactment, must be taken to have the meaning given thereto in *Somers* v. *Keliher*, 115 Mass. 165. It is unnecessary to decide, in view of the facts, whether the last named statute was repealed by implication by St. 1911, c. 727, §§ 22, 25. *Wilson* v. *Head*, 184 Mass. 515. The assignment operated to transfer at least "whatever balance [then] may be due me," and there was then due $1,800. The contract had been substantially performed, and it may be inferred from the fact that the order was not given until after Mr. Hammond had had a conference with the trustees of the University Associates and that it was given with their knowledge and assent. See *Allen* v. *Mayers*, 184 Mass. 486. It was not an assignment of "future earnings" within the meaning of the statute, and the law did not require that it should be recorded.

Assuming that the assignment was not voidable because not recorded, was it such because it transferred property of an insolvent to a creditor receiving it, or to a creditor to be benefited

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thereby, that person having reasonable cause to believe that such transfer would affect a preference within the provisions of the bankruptcy act of 1898, § 60, a, b (U. S. St. 1898, c. 541, as amended by U. S. St. 1910, c. 412, § 11)? The question which confronts us at the threshold of the inquiry is: Was Burns, on April 7, 1913, an insolvent person? "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Bankruptcy act of 1898, § 1 (15).

The testimony offered to show the value of the assets and the amount of the debts could not designedly have been more vague, indefinite and unsatisfactory. It does appear that there were three parcels of real estate, in the city of Cambridge, but no evidence was produced or offered to show the fair value of any single parcel or of all the parcels, nor was there any testimony of market value, assuming that in a supposable case there may be a difference in these terms of measure of value. Remington on Bankruptcy, (2d ed.) §§ 1350, 1351. The evidence showed that the first of the three parcels was let out at a gross weekly rental of $8, the second at a gross monthly rental of $35, and the third, a double house, was occupied by Burns and his son, with no stated rental value. No testimony appears to have been given of the fair or market value of any personal property.

It would be possible to estimate the annual rental value of the two rent producing parcels, but no data exist upon which an opinion can rest of the market or rental value of the third parcel.

Even if it were possible to determine by estimate the rental value of these properties, the fair or market value remains an unanswered speculative question. So long as this question remains unanswered it is impossible to say that Burns was insolvent when he gave the assignment to Bernier.

As to the debts the son testified: "Well, I don't know; the schedule in bankruptcy will show that. I think $25,000, — I think." Again: "I couldn't state the exact amount. . . . I should estimate $25,000; I don't know whether I am $10,000 out or not." The precise question was whether the property of Burns,

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at a "fair valuation," would be sufficient to pay his debts, and for the solution of that question it was quite as needful to ascertain with some degree of precision the amount of his debts as the value of his property. *Schloss* v. *A. Strellow & Co.* 156 Fed. Rep. 662.

It becomes unnecessary to determine whether Webster or his wife had a possible claim against Burns by reason of the fact that the subcontractor Bernier had a possible mechanic's lien on Mrs. Webster's land for labor performed and furnished. See *Angier* v. *Bay State Distilling Co.* 178 Mass. 163, 171. If not, then the Websters were not persons to be benefited within the provisions of § 60 a, b, and the act prohibiting preferential transfers is not applicable to them or to either of them. *Richardson* v. *Shaw*, 209 U. S. 365. See cases collected in Collier on Bankruptcy, (10th ed.) 813, notes 145, 146; *Clarke* v. *Rogers*, 183 Fed. Rep. 518 (affirmed in 228 U. S. 534).

The decree appealed from must be reversed.

So ordered.

LAURENCE H. H. JOHNSON, executor, *vs.* CAROLINE B. FOSTER.

Suffolk. March 5, 1915. — May 21, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Evidence, Opinion, Declarations of deceased persons, Of mental condition, Remoteness. *Fraud and Undue Influence*. *Practice, Civil*, Conduct of trial, Judge's charge.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, a witness, who had had great opportunities for observing the alleged testator, was asked as to a certain period "What did you notice in that period about [the alleged testator]; that is, what facts did you notice to show as to whether he was easily influenced?" The witness answered, "He was childish," and this answer was stricken out by order of the presiding judge against the exception of the contestant of the will. The witness on further examination apparently stated all the facts from which he drew his conclusion, and they appeared to be neither complex, difficult of statement or description nor full of minute detail. *Held*, that under these circumstances there was no error in striking out the conclusion of fact made by the witness

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which approached so nearly the inferences which it was the province of the jury to draw from the facts presented to them.

It seems that a witness properly may be allowed to state a conclusion of fact at which he arrived as the result of his personal observation, when the facts upon which his inference was based are so complex and so difficult to narrate as to make their presentation to the jury impracticable.

Whether a declaration of a deceased person which is offered in evidence was made "upon the personal knowledge of the declarant" is a preliminary question to be decided by the presiding judge before the declaration can become admissible under R. L. c. 175, § 66, and the judge's conclusion of fact on such preliminary question is not subject to revision unless manifestly wrong.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, where it appeared that the alleged codicil was executed nine years later than the alleged will, the presiding judge in the exercise of his discretion limited the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged will and ending four years after the date of the alleged codicil, when a major surgical operation was performed upon the alleged testator, and excluded evidence of the alleged testator's appearance, conduct and habits of life after that time. *Held*, that there was nothing unfair or arbitrary about the judge's exercise of his discretion, and that an exception to the exclusion of the evidence must be overruled.

Where, at the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and that of a codicil by him were procured by fraud or undue influence, the presiding judge in his charge, has stated the law accurately and clearly and has made correct statements of the evidence, it is no ground for exception to his charge, that he saw and called attention to more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting on the testimony of the witnesses for the executor.

PETITION in the Probate Court for the county of Suffolk dated March 28, 1913, for the allowance of an alleged will and codicil of Henry A. Wheelwright, late of Boston, who died on March 15, 1913, at the age of eighty-six years.

The Probate Court made a decree allowing the will and codicil, from which Caroline B. Foster, who was a cousin of the testator and his sole heir at law and next of kin, appealed to the Supreme Judicial Court. By an order of that court the following issues were framed for a jury and were sent to the Superior Court for trial.

"First Issue: Was the alleged will of Henry A. Wheelwright duly executed?

"Second Issue: Was the alleged codicil to said will duly executed?

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"Third Issue: Was the said Henry A. Wheelwright at the time of the execution of said will of sound mind?

"Fourth Issue: Was the said Wheelwright at the time of the execution of said codicil of sound mind?

"Fifth Issue: Was the said codicil obtained by fraud or undue influence on the part of William Laurence Underwood, or Francis L. Underwood, or both?

"Sixth Issue: Was the residuary clause of the said alleged codicil procured by fraud or undue influence on the part of Francis L. Underwood and William Laurence Underwood, or either of them?"

The issues were tried before *King*, J. Upon each of the first four issues the jury answered, "Yes." Upon the fifth and the sixth issues the jury answered, "No." The appellant Caroline B. Foster alleged exceptions, raising the questions which are stated in the opinion.

The devise of land for a public park contained in the will, which is referred to in the opinion, was of certain real estate in Cohasset which was to be conveyed for that purpose to the trustees of public reservations. This devise was not mentioned in the codicil.

W. D. Turner, (*S. S. FitzGerald* with him,) for the appellant.

R. G. Dodge, for the appellee.

PIERCE, J. The appellant contends that there was error in the admission and exclusion of evidence, in the refusal to rule that the effect of the provision of the codicil is to revoke the devise of land for a public park, and also that the summing up of the evidence by the presiding judge was incorrect, unfair and prejudicial to her side of the case.

To a witness, Miss O'Connell, who had had great opportunities of observation, this question was put: "Taking the time immediately after the death of Mrs. Edward Wheelwright and just before January of 1908 when this codicil was signed, what did you notice in that period about Mr. Henry Wheelwright; that is, what facts did you notice to show as to whether he was easily influenced?" She answered, "He was childish." This answer was objected to by counsel for the petitioner, and against the contestant's objection was stricken out; and the contestant duly excepted.

It will not suffice to say that the answer was not responsive or that it was an expression of opinion. It was a fact, a conclu-

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sion of fact, the resultant of data collected in the observation of the decedent for a considerable period of time. In arriving by inference at a conclusion of fact, opinion and judgment necessarily play their part, and a statement which is in truth a fact is not necessarily to be rejected because involving an opinion. *Jenkins* v. *Weston*, 200 Mass. 488, 493. *Partelow* v. *Newton & Boston Street Railway*, 196 Mass. 24. The vital question was whether the facts were so complex and difficult to state as to make their presentation to the jury impracticable; if so, the testimony should not have been rejected; if not, especially when the conclusion of fact is most material to the fact in issue, the facts and the inferences to be drawn therefrom were in the province of the jury alone to determine. Following the rejection of the testimony the witness apparently stated all the facts from which she drew her conclusion, and they appear to be neither complex, difficult of statement or description, nor full of minute detail. It follows that there was no error, and the exception must be overruled.

Another witness, Richard W. Hale, testified: "Before the death of my mother, who died in 1904, in accepting an invitation from Mrs. Edward Wheelwright I had in error addressed my acceptance to Mrs. Henry Wheelwright, and I had received the envelope back in an envelope directed to me in Mrs. Edward Wheelwright's handwriting. I then spoke to my mother." The witness then was asked what his mother said. The counsel for the petitioner objected to this question and the jury were excused. The witness then stated that his mother said to him, "You have seen him personally and you know what he is, — a body without a mind." That she said the error was a shocking one, particularly so because of Henry Wheelwright's mental condition. The judge then said, "I exclude the evidence upon the ground that I am unable to find that the statement claimed to have been made by the witness's mother, now deceased, was made upon the personal knowledge of the declarant, and also upon the ground that it is incompetent as an expression of an opinion and not the statement of a fact within the knowledge of the declarant," and the contestant duly excepted.

The judge, in passing upon the preliminary question of the admissibility of declarations of deceased persons as required by

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R. L. c. 175, § 66, has the right and duty of passing upon the credibility of witnesses and statements, and his conclusions of facts are not reviewable by this court unless manifestly wrong. *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318, 321. No direct evidence shows the extent of Mrs. Hale's opportunities of observation, or that the statement was based upon personal and adequate knowledge of the facts of Mr. Henry Wheelwright's life. The ruling was right and the exception must be overruled.

The decedent had made his will in 1899, and his codicil in 1908. The judge in the exercise of his discretion, which in no sense appears unfair or arbitrary, had limited the evidence of the testator's mental condition to a period beginning in 1895, four years before the date of the will, and ending with a major surgical operation which was performed upon him in January, 1912. The exceptions taken to the exclusion of evidence of the testator's appearance, conduct and habits of life after January, 1912, must be overruled. *Jenkins* v. *Weston*, 200 Mass. 488, 493. *Brown* v. *Brown*, 209 Mass. 388, 395. *Aldrich* v. *Aldrich*, 215 Mass. 164, 168.

There is nothing to indicate that the possibility of the codicil being so construed as to revoke the devise of land for a park was ever in the contemplation of any one. So far as concerns the matters at issue in the case at bar it would seem to be a mere moot question. The exception to the refusal to pass upon this question must be overruled.

It is clear that the presiding judge was not unduly prejudiced in favor of the claim of the contestant, but his charge as to the law was accurate and clear, and his corrected statements of fact find support in the evidence. It is probably true that he saw and called to the attention of the jury more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting upon the testimony of the proponent's witnesses, but so long as a judge states only the truth and does not misstate the law, there is no legal ground of exception. *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444, 448. *Partelow* v. *Newton & Boston Street Railway*, 196 Mass. 24, 34, 35. *Whitney* v. *Wellesley & Boston Street Railway*, 197 Mass. 495, 502.

Exceptions overruled.

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MARGARET BURKE, administratrix, *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Suffolk. March 8, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Insurance, Life. *Infant. Parent and Child.*

Where a father makes an application for an insurance policy on the life of his son fourteen years of age and a policy is issued payable in case of the death of the son "unto the executors, administrators or assigns of the insured," and the father pays all premiums on the policy as they become due until the son becomes more than twenty-one years of age, the son is the insured and neither his father nor his mother is an owner of or a beneficiary under the policy, and, unless specially authorized by the insured, neither of them has authority to surrender the policy to the insurer or to receive under its provisions in its stead a paid up policy; and therefore as between the insured and the insurer the policy is unchanged in legal effect by unauthorized acts of such a nature.

If, at the trial of an action for a breach of the contract, contained in an insurance policy issued by a corporation organized and incorporated in another State, to pay a certain amount on the death of the insured, it appears that by the provisions of the policy it became invalid because of the non-payment of premiums and there was no evidence that such provisions were waived by the corporation or that the corporation was estopped to assert the failure to pay or to tender the premiums; and if it appears further that after the policy thus had lapsed the insured made an application for its revival according to its provisions and that, in the exercise of a right given to it by the policy, the corporation had refused to grant the revival, a verdict must be ordered for the defendant although by the law of the State where the corporation was incorporated the insured after the original policy had lapsed had a right to a paid up policy for a certain amount.

CONTRACT by the administratrix of the estate of Richard Burke upon a policy of life insurance for $216. Writ dated April 18, 1913.

The case was tried before *Hitchcock*, J. The material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. J. Sullivan, for the plaintiff.

C. T. Cottrell, for the defendant.

PIERCE, J. Shortly before December 14, 1903, Edward Burke made application to the Prudential Insurance Company of Amer-

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ica, the defendant in this action, to insure the life of his son Richard, who was born November 3, 1889. On December 14, 1903, the defendant issued a policy numbered 18520029, on the life of Richard Burke, payable in case of death "unto the executors, administrators or assigns of the insured."

Under this policy the person insured, and the beneficiary, was Richard Burke, with the right to the custody of the policy in the father. *Bowers* v. *Parker*, 58 N. H. 565. The father paid the premiums each week as they became due on the policy up to June 26, 1911, at which time Richard had more than arrived at the age of twenty-one years. No premiums thereafter were paid upon the policy by any one. So far as appears, without the authority of Richard, Margaret Burke, Richard's mother, about July 1, 1911, entered into negotiations with an agent of the defendant which resulted in the delivery of the policy to the defendant and the tender of a paid up policy to the mother on July 3, 1911. When tendered she sent the agent with the paid up policy to see her husband. The husband testified that he never authorized any action in reference to the policy; that about the first week or the middle of July the agent came to his shop and placed the policy on the counter. "When he left it on the counter I got up and opened it. . . . I seen the amount and I told him 'Now didn't you promise my wife that you would return this policy with the full amount of the old policy?' Well, he said nothing. I told him he ought to be ashamed of himself and I told him furthermore than he could take the paid up policy away and bring me back the old one. . . . I don't remember him saying anything, but he took the policy and went away."

On November 30, 1911, Richard made a special revival application for the reinstatement of policy No. 18520029, in these terms: "I hereby declare myself, who was formerly insured under the above numbered policy, to be in as good a state of health as when said policy was issued, and that, having allowed it to become lapsed, I wish to renew it, upon the understanding that it will not be in force (although I now pay the arrears) until the company shall have consented to revive the same." He was examined March 24, 1912, and was rejected because suffering from tuberculosis. He died on December 22, 1912.

The policy was in terms payable to the executors, adminis-

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trators and assigns of Richard Burke, and thus is distinguishable from that in *Knowles* v. *Knowles*, 205 Mass. 290. The father and mother as such were not owners or beneficiaries, nor had they as guardians by nature during the minority of Richard any legal right to consent to a cancellation of the policy or to its being changed to a paid up policy, at least before its forfeiture for the non-payment of premiums. *Griffith* v. *New York Life Ins. Co.* 101 Cal. 627. *Hooker* v. *Sugg*, 102 N. C. 115. *Whitehead* v. *New York Life Ins. Co.* 102 N. Y. 143. As Richard had reached his majority at the time the mother attempted, with the consent of the defendant, to surrender the policy for a paid up policy, it is clear that her act was not binding upon Richard; and it was equally clear that the policy, as between Richard and the defendant, was legally unchanged.

The record discloses neither acts nor defaults to warrant the argument that the jury could find either waiver or estoppel to assert that the premiums were not paid or tendered as they became due.

It becomes unnecessary to determine whether the mother's act was induced by misrepresentation and therefore voidable, because before the policy had lapsed for the non-payment of premiums all parties were aware that the father and the mother repudiated the alleged surrender and claimed the policy to be in force.

The obligation of a life insurance contract, in the absence of contract or statute otherwise providing, is conditional upon the payment of the premiums as they become due. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24, 27. 25 Cyc. 698, and cases cited. In the case at bar no premiums were paid, or tendered and refused, after June 27, 1911. The policy by its terms lapsed thereafter at the expiration of four weeks. The sixth provision of the policy provides: "If this policy is lapsed for non-payment of premium, it will be revived within one year from the date to which premiums have been duly paid upon payment of all arrears, provided evidence of the insurability of the insured satisfactory to the company be furnished." The insured availed himself of the provision, was examined, found to be suffering from tuberculosis, and was rejected.

There remained to him the right to a paid up life policy, in

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accordance with chapter 356 of the laws of 1895 of the State of New Jersey.

This action is upon the original policy, and for the reasons above stated cannot be maintained.

The ruling of the presiding judge was right, and the entry must be

Exceptions overruled.

MARY DOLAN *vs.* CHARLES J. JACOBS COMPANY.

Suffolk. March 8, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Nuisance. Negligence, In guarding hole in highway, In use of highway.

One who under a lawful permit from a city digs a trench in a public sidewalk assumes the duty of taking proper precautions to prevent accidents to travellers. In the absence of adequate precautions such trench becomes a nuisance and the person who dug it is liable for injury caused by it to a traveller in the exercise of due care.

At the trial of an action by an elderly woman against a corporation, which under a permit from a city was obstructing a sidewalk for the digging of holes in front of adjoining houses for the installation of water meters, for personal injuries caused by falling into one of the holes, there was evidence tending to show that the hole into which the plaintiff fell was five feet square and extended across the sidewalk to within eighteen inches of one of the houses, that at the close of the day's work the defendant's workmen left both of the trenches guarded by wooden horses placed on each side, the end of each horse nearer the street resting on a pile of dirt which had been made nearly flat by children playing upon it and the other end extending only to within eighteen inches of the side of the hole nearer the house, and that there was a further space of eighteen inches between the trench and the house, that after dark a red lantern, darkened and black, burning with a dim light, was placed on the middle of the horse on the side from which the plaintiff approached, that, before the accident, the plaintiff had passed down the street, in some way as to which there was no evidence, to a store, that she returned when it was dark, attempted to pass through the space between the end of the wooden horse and the house, and fell into the trench. *Held,* that the questions, whether the plaintiff was in the exercise of due care and whether the defendant left the trench insufficiently guarded or lighted and thus caused the plaintiff's injuries, were for the jury.

TORT for personal injuries sustained on November 9, 1911, by a fall into a trench dug by the defendant for the purpose of

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installing a water meter in a house on Morris Street in the part of Boston called East Boston. Writ dated June 5, 1913.

In the Superior Court the case was tried before *Lawton*, J. At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

O. Storer, for the plaintiff.

L. C. Doyle, (*W. I. Badger* with him,) for the defendant.

PIERCE, J. Under a permit from the city of Boston, for the purpose of putting water meters in the houses numbered 89 and 91 on Morris Street, East Boston, the defendant during the day of November 9, 1911, dug two holes or trenches, each five feet square by about four feet deep, between the curbstone and the above named houses. The hole leading to number 89 was on the left of the front door of that house, while the one in front of number 91 was on the right of its front door.

The jury could find that at the close of the day's work the trench was left guarded by wooden horses placed on either side of the two holes; that the ends of the horses nearer the street rested upon a pile of earth excavated from the trenches, which had been made nearly flat by children playing upon it; that the ends near the houses rested at the sides of the trenches, but did not extend to the end of either trench and did not cover a space of eighteen inches or two feet between the inside end of the horse and the inside line of the hole. The jury also could find that there was a space of seventeen or eighteen inches between the inside line of the trench and the side of the house, and that this space was not barred or guarded on either end or on the side adjacent to the hole. They could find that the accident hereinafter described happened shortly before six o'clock, P. M., that it was dark and the place was a dark place; that a lantern was suspended from the middle of each inside horse, and that the lantern "was a red one, very dull color, all darkened and black;" "a dim red light."

The plaintiff lived at number 89 Morris Street. She left her house between five and six o'clock in the evening of the day in question, to go to a grocery on Putnam Street. In order to reach Putnam Street she had to pass directly into the street or by the house numbered 91 (which was on the right of number 89), over the space between the trench and the house. She was an elderly

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person, and it does not appear from the record that she testified as to what course she took or that she was asked to do so. When returning from the store, as she passed along the sidewalk in the dusk of the early evening, her vision aided only by the dim red light of a lantern "all darkened and black," suspended from the middle of a horse standing on the far side of the trench she was approaching, she saw, or reasonably might have thought she saw, that a way of at least three feet was reserved for travellers between the end of the barrier by the side of the trench and the house. She testified that when she fell she was on the sidewalk, coming from the store. "I was coming . . . and my foot went in . . . I fell down. . . . I was looking before me for fear I would get any stumble, but something ketched my dress, and I fell; I fell down." She also testified that she saw nothing before her that she "examined with interest. I seen nothing only where I walked." She thought there was a light. "It was away down in underneath me," and "I did not gain much help by the light."

Without a lawful permit from the city the defendant was without right to obstruct public travel and the trench was a public nuisance. *Commonwealth* v. *Boston*, 97 Mass. 555. With the license the obstruction became a nuisance and the acts of the defendant became unlawful unless proper precautions were instituted and maintained to prevent accidents to travellers in the exercise of due care. *Robbins* v. *Chicago*, 4 Wall. 657. See *Commonwealth* v. *Packard*, 185 Mass. 64; *Call* v. *Allen*, 1 Allen, 137, 143.

Upon all the evidence the jury could find that the plaintiff was in the exercise of due care. *Weare* v. *Fitchburg*, 110 Mass. 334. *Kelly* v. *Blackstone*, 147 Mass. 448. *Torphy* v. *Fall River*, 188 Mass. 310. They could find also that the defendant left the trench insufficiently guarded or lighted, and that as the direct consequence of its neglect the plaintiff received the injury of which she complained. The direction of a verdict for the defendant was error.

Exceptions sustained.

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PETER CONTAKIS *vs.* CARMINE FLAVIO, administrator.

Suffolk. March 9, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Partnership. Joint Tortfeasors. Judgment, Vacation. *Bond,* Supersedeas. *Practice, Civil,* Vacation of judgment, Supersedeas bond.

One who has suffered injury or damage by reason of a tort of a partnership may elect to bring an action of tort against all the partners jointly or to bring a separate action against each partner.

A judgment in an action of tort against all the members of a partnership is an entirety and is indivisible.

If, upon the petition of one of the defendants in an action of tort against all the members of a partnership jointly, a judgment obtained in that action is vacated, it is vacated against all the defendants and all remedies for its collection against the several defendants are discharged.

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied.

PETITION, filed and amended in the Superior Court on September 1, 1914, for the vacation of a judgment obtained by the administrator of the estate of one Emelio Flavio against George K. Anastos, George Masganas, Nicholas Kalliavas and the petitioner, alleged to be copartners doing business under the name, Vassara Fruit Company, in an action of tort for personal injuries caused to Flavio by his being run into by a wagon of the Vassara Fruit Company.

J. W. Keith, for the respondent.

No counsel appeared for the petitioner.

PIERCE, J. Carmine Flavio, the administrator of the estate of Emelio Flavio in the principal action, elected to sue all the members of a partnership doing business under the firm name of Vassara Fruit Company, jointly in an action of tort. Four persons, among whom was the petitioner, Peter Contakis, were named in

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the writ, and the return thereon showed due service upon them all. Final judgment was entered against all the defendants on April 21, 1914, and on the day following (April 22, 1914) execution duly issued. On August 22, 1914, Contakis, who had been arrested on an alias execution, applied to the Municipal Court of the City of Boston for the oath for relief of poor debtors, and recognized for his appearance in the Poor Debtor Session of that court. On September 1, 1914, before any default, Contakis filed a petition in the Superior Court asking that the judgment of April 24, 1914, be vacated and that a supersedeas of the execution be issued thereon. As reasons therefor he alleged that no service ever was made upon him; that the attorney who accepted service for him had no authority so to do; that he (the petitioner) was not a member of the defendant firm at the time a servant of the firm caused the injury complained of, nor was he such at the time of the suing out of the writ; that he knew nothing of the action until some time after judgment was obtained thereon, and that at the time the action was brought and for a long time thereafter he was not in the Commonwealth but was in the Kingdom of Greece.

On October 23, 1914, after due notice, an order was entered in the Superior Court that a supersedeas of said execution should issue on the filing of a bond of $5,000. On January 19, 1915, a bond was filed in that court and approved after hearing; and thereupon a supersedeas issued. On February 4, 1915, Flavio filed a motion in the Superior Court asking, among other things not material to this issue, that the order of supersedeas might be "so modified as not to deprive him of his right to collect said execution from the other defendants named in said action." The presiding judge * ruled that the motion in that respect should be denied, and "believing that this question should be determined before a final hearing upon the petition to vacate the judgment," he reported the question to this court. "If the ruling is right" the order "is to be confirmed. If erroneous, then there is to be a hearing upon the question of the modification of said supersedeas as asked for by the said Flavio."

* *Wait*, J.

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The plaintiff Flavio, before purchasing his writ, had an election to sue each partner severally, or to sue more than one jointly. 1 Wms. Saunders, 472, 473, 475. He elected to join all in the writ, prosecuted his action against all, and obtained a joint final judgment. By leave of court it was within his power and right, at any time before final judgment, to discontinue as to as many as he chose and to proceed to prosecute his action against those remaining. R. L. c. 173, § 48. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 490.

Having prosecuted his action to final judgment against all, that judgment became an entirety, and as such is indivisible. In an action of tort against several alleged joint wrongdoers, it is not legally possible to obtain a joint judgment against some of the defendants and a several judgment against others. R. L. c. 177, § 6, is not applicable to joint tortfeasors when sued jointly. *Cameron* v. *Kanrich*, 201 Mass. 451. *Munroe* v. *Carlisle*, 176 Mass. 199, 201. Because of the technical rule that a joint judgment is entire and indivisible, it follows that if such a judgment be void as to one defendant it is void as to all. *Hall* v. *Williams*, 6 Pick. 232, 247. *Richard* v. *Walton*, 12 Johns. 434. *Holbrook* v. *Murray*, 5 Wend. 161. The procedure followed in *Thomson* v. *Sleeper*, 168 Mass. 373, is not applicable because the judgment therein was not attacked, was founded on contract, and was valid against the co-defendant. In the case at bar a vacation of the judgment would result in the discharge of all remedies for the collection, including therein a recognizance taken as a substitute for the arrest and imprisonment of Contakis. *Whitton* v. *Bicknell*, 3 Allen, 472.

In the case at bar the judge may have found on any one of several grounds set down in the petition that Contakis was not duly served with process, and that for that reason the judgment as against him was void or voidable. If so, for the reasons above stated the entire judgment was void or became void when the judgment against him was vacated. *Hall* v. *Williams*, *supra*. *Richard* v. *Walton*, *supra*. *Holbrook* v. *Murray*, *supra*. To decide otherwise is to hold that the plaintiff is entitled to a present joint judgment as against three of the defendants and to a possible several judgment, after a new trial, against the remaining defendant.

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The ruling of the presiding judge was clearly right, and according to the terms of the report the entry must be

Order of the Superior Court affirmed.

CHARLES E. GILES *vs.* JOHN T. KENNEY, administrator.

Suffolk. March 9, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CARROLL, JJ.

Probate Court, Petition for leave to sell real estate for purpose of distribution, Appeal. *Words*, "Parties interested."

The assignee of a mortgage of real estate, given, after the death of a former owner of the real estate and before the appointment of an administrator of his estate, by a person who had acquired the rights of the heirs of the former owner in the property to secure a note of such person, is not one of the "parties interested" who, upon the filing of a petition under R. L. c. 146, § 18, as amended by Sts. 1904, c. 217; 1906, c. 73; 1907, c. 236, by the administrator for leave to sell the real estate for the purpose of distribution, have a right to notice of the petition, in case they do not consent, and to appeal from a decree granting the petition or from a decree refusing to revoke the license granted.

PETITION, filed in the Probate Court for the county of Suffolk on April 27, 1914, for a revocation of a license granted to the administrator of the estate of Peter F. Duffy, late of Providence in the State of Rhode Island, to sell certain real estate of the intestate in this Commonwealth for the purpose of distribution.

After a hearing before *George*, J., the petition was dismissed.

On appeal the case was heard by *Pierce*, J., who dismissed the appeal on the ground that the petitioner was not a party "interested" and therefore had no right to be heard or of appeal. The petitioner appealed to the full court.

J. C. Johnston, for the petitioner, submitted a brief.

F. G. Bauer, for the respondent.

DE COURCY, J. It appears from the memorandum of the single justice that the respondent's intestate, Peter F. Duffy, died at Providence, Rhode Island, on June 2, 1910, survived by a widow and two adult daughters, and leaving as property a piece

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of unincumbered real estate in Boston. The daughters transferred their interest in the property to the widow, and she placed a mortgage on the property on November 1, 1911, which mortgage was assigned to the petitioner July 10, 1913.

The respondent was here appointed administrator of the estate of Peter F. Duffy on July 24, 1913, upon the petition of the widow, assented to by the daughters; and a week later his petition to sell the real estate for purposes of distribution was allowed by the Probate Court. The present petition for the revocation of the license to sell was denied by that court, and the appeal therefrom to this court was dismissed by the single justice on the ground that the petitioner Giles was "not a party interested and therefore had no right to be heard, or of appeal."

The contention of the petitioner is that he was entitled to notice of the petition for a license to sell the real estate belonging to the estate of the deceased, on the ground that he was one of the "parties interested" referred to in R. L. c. 146, § 18, as amended by St. 1907, c. 236. Although the court has not been called upon heretofore to determine who are included in the term "parties interested" as used in § 18, it expressly appears in the sections which deal with petitions for license to sell to pay debts and legacies, that the parties entitled to notice are those interested in the estate of the deceased. See R. L. c. 146, §§ 10, 12. It was held in *Harrington* v. *Harrington*, 13 Gray, 513, that the wife of a devisee was not a "person interested" under Rev. Sts. c. 71, § 8, and hence not entitled to notice. In *Yeomans* v. *Brown*, 8 Met. 51, it was held that a tenant in possession of the premises having a title thereto by disseisin, was not interested in the estate of the deceased within the meaning of the same statute. As was said in that case at page 57, "It cannot be supposed that the Legislature intended to authorize a stranger to the testator's title to interpose objections to the settlement and disposition of his estate." The right of the administrator to sell the real estate on license cannot be defeated by the death, conveyance or disseisin of the heir or devisee. See *Drinkwater* v. *Drinkwater*, 4 Mass. 354, 359; *Tyndale* v. *Stanwood*, 182 Mass. 534.

It seems to us that there is no sound basis for giving to the term "parties interested," when used with reference to a sale for

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distribution, under § 18, a meaning different from that given to it in connection with a sale for the payment of debts under § 10. As stated by Braley, J., in *Security Bank of New York* v. *Callahan*, 220 Mass. 84, "The court of probate in a decree of distribution deals only with heirs and legatees, without regard to their assignments or pledges," citing *Lenz* v. *Prescott*, 144 Mass. 505, 515; *Coram* v. *Davis*, 209 Mass. 229, 247. The practical considerations are in favor of this rule. The Probate Court records disclose who are the heirs and distributees. It would be impracticable to compel the administrator at his peril to ascertain, in the registry of deeds and bankruptcy court up to the moment of granting the license to sell, all outstanding conveyances, liens, attachments and incumbrances affecting the interest of heirs or devisees in the property; and such a requirement would invalidate decrees granted where notice was not given to all such persons, and would seriously affect titles to real estate heretofore acquired under the established practice.

In *Smith* v. *Bradstreet*, 16 Pick. 264, relied on by the petitioner, it was held that an attaching creditor of the interests of one of the heirs at law of the deceased was entitled to appeal from a decree allowing the will. But, as was pointed out in *Farrar* v. *Parker*, 3 Allen, 556, the right of appeal in that case was given by the statute broadly to any "person" aggrieved. See St. 1817, c. 190, § 7. The statute now in question provides that license to sell may be granted with the consent merely of all "parties" interested.

The petitioner is not left without ample relief. He has a remedy against the proceeds of the sale, which must be held for two years from the time of the filing of the administrator's bond.

His rights are in no way concluded by the decree of the Probate Court, which, as to him, was *res inter alios*. *Lewis* v. *Bolitho*, 6 Gray, 137.

The validity of the sale is not before us.

Decree affirmed.

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EDMUND A. WHITMAN & another, trustees, *vs.* MABEL H. HUEFNER & others.

Middlesex. March 10, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Trust, Construction, Powers and duties of trustee. *Devise and Legacy. Real Property.*

A testator by his will gave the residue of his estate to trustees in trust to pay the income to his wife for life, with power to pay to her out of the principal such amount as should meet the requirements of her suitable maintenance and the care and education of his minor children, the will further providing that upon the decease of the widow the trustees should "pay over to my children and to the issue of any deceased child by right of representation all of said trust fund then remaining, share and share alike, the issue of any deceased child to take the share the parent would have taken, if living, to have and to hold the same to them and their heirs." From other provisions of the will it appeared that the testator had used language nearly identical to provide for the distribution of the trust fund in case of the death of his widow without remarrying, and upon her remarriage and upon her death after remarriage. *Held*, that by the established rules of construction the interest of the children of the testator vested at his death, the mere fact that the trustees were authorized to expend principal during the widow's life and thus to decrease the size of a remainderman's share not establishing an intention to postpone the vesting until the widow's death.

Where the language of a will does not make it clear whether a certain remainder is vested or contingent, the remainder will be deemed to be vested unless such construction would result in a disposition of the property inconsistent with the testator's intention.

Where property is given in remainder by the provisions of a will, whose language does not clearly state whether the remainder is vested or contingent, to children or other descendants of the testator, that circumstance tends to indicate that vested rather than contingent remainders were intended.

Where by the provisions of a will trustees are given power and authority to sell and convey and to make new investments and exchange of securities, but the will contains no express direction that the real estate held by them shall be sold and turned into money and a clear intention thus to convert cannot be implied from the language or general scope of the will, if the trustees sell the real estate the proceeds thus received must be treated by them as realty until the fund resulting from the sale reaches the hands of one who is entitled to treat it as his own absolutely and for all purposes.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 2, 1915, by the trustees under the will of William C. Haskins, late of Medford, for instructions.

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The case was reserved by *Carroll*, J., upon the bill and answers for determination by the full court. The following statement of the case is taken from the opinion of the court.

William C. Haskins died in 1892, leaving a will in which, after providing for the payment of his debts and for the care of his cemetery lot, he gave the residue of his estate to trustees in trust to pay the income to his wife for life, with power to pay to her out of the principal such amount as should meet the requirements of her suitable maintenance and the care and education of his minor children. The will then provided: "And upon her decease to pay over to my children and to the issue of any deceased child by right of representation all of said trust fund then remaining, share and share alike, the issue of any deceased child to take the share the parent would have taken, if living, to have and to hold the same to them and their heirs."

There were living at the testator's death his widow, Maria E., a married daughter, Hannah C. Coburn (now the defendant Hannah C. Jackson), a son, William, and a daughter, Alice B., and no issue of any deceased children. William Haskins died April 24, 1899, intestate and without issue then living. He left a widow, Mabel Haskins (now the defendant Mabel H. Huefner), who is the administratrix of his estate, and as next of kin his mother, Maria E. Haskins. Alice B. Haskins married the defendant Arthur C. Crombie, and died intestate August 5, 1903, leaving a daughter Barbara who died July 18, 1905, under the age of four years. The defendant Arthur C. Crombie is the administrator of the estate of his wife Alice B. Maria E. Haskins, the widow of the testator William C. Haskins, died on October 19, 1914. She left a will, not yet proved, in which the defendants Marion C. Sawyer and Alice C. Nottage are named as residuary legatees.

William Haskins, senior, died on May 19, 1871, testate; and certain questions arise under the fourth clause of his will.

E. A. Whitman, for the plaintiffs, stated the case.

G. D. Burrage, for the defendant Mabel H. Huefner.

W. I. Nottage, for the defendant Arthur C. Crombie.

B. Corneau, for the defendant Hannah C. Jackson.

C. R. Lamson, for the defendants Marion C. Sawyer and Alice C. Nottage, submitted a brief.

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DE COURCY, J. [After the foregoing statement of the case.] 1. The principal question relates to the disposition of the remainder of the trust fund under the will of William C. Haskins; that is, whether it vested at the death of the testator in his three children then living, or was contingent until the death of the testator's widow and thereupon vested in his only child and issue then living. The intention of the testator not being clearly manifested by the language of the clause in controversy, we must resort for aid to the established rules of construction that long have been applied to similar clauses in like cases. One that is well settled is that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested. *Bosworth* v. *Stockbridge*, 189 Mass. 266, and cases cited. And where, as in this case, the remainder is to children or other descendants of the testator, that circumstance tends to indicate that vested rather than contingent remainders were intended to be created. *Gibbens* v. *Gibbens*, 140 Mass. 102. *Stanwood* v. *Stanwood*, 179 Mass. 223. *Southard* v. *Southard*, 210 Mass. 347.

When we consider the rest of the will, we find support for the construction that the testator intended to create vested remainders by the clause in question. This is especially true of the portion of the third article, where provision is made in case of the remarriage of his widow, as follows: "upon that event I direct my said trustees to pay over to my children and to the issue of any deceased child by right of representation, equally, two thirds of said trust fund, the issue of any deceased child to take by right of representation the share the parent would have taken, if living, the share of said two thirds payable to either of my children to be paid to such of them as shall have arrived at the age of twenty one years as soon as may be after the marriage of my wife, and the share thereof payable to such of my children as shall not at the time of the marriage of my wife have arrived at the age of twenty one years to be paid upon their attaining the age of twenty one years, to have and to hold the same to them and their heirs; and the remaining one third part of said trust fund to continue to hold and keep safely invested and the income thereof to pay over to my wife quarterly at least for and during the full term of her natural life, and upon her decease to pay over the said

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remaining third or principal sum then held for the benefit of my wife unto my children and the issue of any deceased child to take by right of representation the share the parent would have taken, if living, to have and to hold the same to them and their heirs." It is to be observed that the testator has used language nearly identical to provide for the distribution of the trust fund in three cases, namely, upon the death of his wife without remarrying, upon the remarriage of his wife, and upon the death of his wife having remarried. In a will drawn with some care it is not to be presumed that the testator intended that in the event of the remarriage of his wife one set of persons should receive two thirds of his estate and a different, or possibly different, set of persons should receive the other one third; as would be the case if the clause in controversy were interpreted as meaning children living at the time of distribution, instead of those living at his own decease. *Rotch* v. *Rotch*, 173 Mass. 125.

The mere fact that the trustees are authorized to expend principal for the support of the testator's widow and for the maintenance and education of his children, and that thereby a remainderman's share may be decreased in size, does not establish an intention to postpone the vesting of the remainder until the widow's death. *Bancroft* v. *Fitch*, 164 Mass. 401. *Bryant* v. *Flanders*, 201 Mass. 373. *Boston Safe Deposit & Trust Co.* v. *Nevin*, 212 Mass. 232.

We are of opinion that the case at bar comes within the general rule as laid down in *Gibbens* v. *Gibbens*, 140 Mass. 102, 104, and expressly recognized in *Crapo* v. *Price*, 190 Mass. 317, relied on by the defendant Hannah C. Jackson. In the latter case the limitation over was not made to children of the testatrix or to her relatives by blood or marriage; and the court said (pages 320, 321) that "no help can be derived from the cases which have laid down the rule that a remainder given to the testator's children is to be regarded as vested, even though the court might otherwise have treated it as contingent."

2. In the fourth article of the will of William Haskins, senior, a trust fund of $8,000 was established for the benefit of his widow, Matilda T. The trustees were directed "at and after the decease or marriage of my said wife as the case may be, then to pay over the said principal sum, and all remaining income and in-

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terest thereof discharged of all trusts unto my legal heirs, according to the statutes of distribution of this Commonwealth." The widow Matilda T. Haskins died in 1901. The question whether the remainder to the "legal heirs" vested at the death of the testator is determined largely by the same considerations already stated when dealing with the will of William C. Haskins. Without repeating them, we find no language in the will manifesting an intention to postpone the vesting of the remainder until the death of the testator's widow, the life beneficiary under the trust. We are of opinion that, in accordance with the general rule, the remainder vested in William C. Haskins, who was the only child and "legal heir" of the testator, William Haskins, senior, under the laws then in force; and that upon the death of William C. in 1892, that remainder became part of his estate. *Holmes* v. *Holmes*, 194 Mass. 552. *Jewett* v. *Jewett*, 200 Mass. 310. *Gray* v. *Whittemore*, 192 Mass. 367, 380. See Gen. Sts. c. 90, §§ 1, 15, 16, 18.

3. At the death of the testator William C. Haskins he was seised and possessed of certain parcels of real estate. All these lands have been sold in accordance with the power given by the will and the proceeds invested and treated as a part of the trust fund. Nowhere in the will is there an express direction that the real estate shall be sold and turned into money. It simply gives the trustees power and authority to sell and convey, and to make new investments and exchange of securities. Notwithstanding the arguments based on the character of the property, and on the force of isolated expressions in the will referring to investments in "interest and dividend paying securities" and payments out of the "principal trust fund," a clear intention to convert cannot be implied from the language or general scope of the will. Accordingly the general rule must be followed, and the proceeds of the real estate sold by the trustees must be treated as realty until the fund resulting from a sale reaches the hands of one who is entitled to treat it as his own absolutely and for all purposes. *Gray* v. *Whittemore*, 192 Mass. 367, 384, and cases cited. *O'Brien* v. *Lewis*, 208 Mass. 515.

As the defendant Hannah C. Jackson has outlived the widow of the testator William C. Haskins, presumably this is immaterial to her, as she is entitled to take the share which vested in her on

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her father's death, whether it consisted of real or personal estate. The one third share of the daughter Alice B. Haskins, later Alice B. Crombie, in the real estate situate in Massachusetts, since the death of her child Barbara is held by the surviving husband and father, Arthur C. Crombie, under the statutes then in force. As already stated, William Haskins, son of the testator William C. Haskins, died intestate in 1899, leaving a widow (now Mabel H. Huefner, one of the defendants) who is administratrix of his estate, and, as next of kin, his mother, Maria E. Haskins. While his administratrix succeeded to his rights in the personal property, his heirs at law succeeded to his rights in the real estate; and his undivided one third interest in the Massachusetts realty passed to his mother under Pub. Sts. c. 125, § 1, then in force. As his only interest therein was a vested remainder in property held in trust, his widow had no common law dower therein; *Seaman* v. *Harmon*, 192 Mass. 5; and did not take as statutory heir under Pub. Sts. c. 124, § 3. *Watson* v. *Watson*, 150 Mass. 84.

The proceeds of the undivided interest in the land owned by the testator William C. Haskins in Anne Arundel County, Maryland, must be distributed in accordance with the statute law of that State, as set forth in the record. According to the law in force at the death of William Haskins (1899), it appears that his widow, now Mabel H. Huefner, was entitled to dower in lands held by equitable as well as legal title in her husband; and she is entitled to an interest in the proceeds of her husband's one third share equivalent to her dower rights. Subject to this dower interest, the share of William Haskins in the Maryland realty passed to his two sisters Hannah C. Jackson and Alice B. Crombie, in equal shares. After the death of Alice B. Crombie her interest in the Maryland realty presumably went to Arthur C. Crombie, either as her husband or as the sole heir of their daughter Barbara.

The tracing of the proceeds of real estate into the present investments is a practical question with which we need not deal at this time. The shares of personal property belonging to the estates of William Haskins and Alice B. Crombie will be paid of course to their respective administrators.

The plaintiffs are to be instructed to distribute the estate in their hands in accordance with this opinion.

Decree accordingly.

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AMERICAN STABLE COMPANY *vs.* WILLIAM W. CLARKE.

Suffolk. March 11, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Poor Debtor. Recognizance. Judgment.

R. L. c. 168, § 66, requires that in an action for the breach of a poor debtor's recognizance, if a breach is proved, "judgment shall be entered for the amount of the penalty," and accordingly in such an action the trial judge must refuse a request of the defendant to rule that judgment should be entered for the plaintiff for nominal damages only.

CARROLL, J. On March 19, 1912, the defendant became surety on two recognizances for Edward B. White, who had been arrested on mesne process on two writs issuing from the Municipal Court of the City of Boston. The condition of each recognizance was that White, within eleven days from the date of the writs, would apply to take the oath for the relief of poor debtors or the oath that he did not intend to leave the State. White defaulted on each recognizance. Each of the writs was duly entered on the return day, March 30, 1912. In one case judgment was entered on April 18, 1912, for $136.53 damages and $6.32 costs; in the other case judgment was not entered until April 24, 1914, when it was entered for $300 damages and $19.64 costs of suit. Those actions were on promissory notes and the amount due thereon was agreed to.

This action for the breach of the two recognizances was brought on May 3, 1912, in the Superior Court. Judgment was entered for the penal sum of the two recognizances, $600, and execution was to issue for $328.76. The report * states that "the purpose of the defendant's exceptions is to determine, first, as to whether the plaintiff brought his action prematurely; second, whether the amendment setting up the recovery of the judgment in the second action was properly allowed; third, whether the amendment having been properly allowed, execution should issue for nominal damages only."

* By *Hamilton*, J.

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These questions are not before us, as no ruling was asked and none refused bearing upon these points.

The plaintiff's action, however, was not prematurely brought. The default of the principal on the recognizances occurred when he neglected to submit to an examination within eleven days from the date of the writ, as stipulated in the agreement. R. L. c. 168, § 66, requires that an action for the breach of a recognizance may be brought within one year after the breach occurs, and the action in the case at bar was brought within one year after the recognizances were broken.

The amendment setting up the judgment was properly allowed. R. L. c. 173, §§ 48, 121.

Execution could not issue for nominal damages only. It should issue, in the language of the statute, "for so much thereof only as may be justly and equitably due." R. L. c. 168, § 66.

The defendant asked the judge to rule that judgment should be entered for the plaintiff for nominal damages only, and the refusal of the judge to make this ruling presents the only question of law disclosed on the record. The judge properly refused the request. The statute above referred to declares that, in actions to recover on a bond or recognizance which is broken under poor debtor process, "judgment shall be entered for the amount of the penalty." The amount which is due is to be determined after judgment is recorded and before execution issues, but in all cases the judgment is to be for the penal sum of the bond. R. L. c. 168, § 66.

The defendant relies upon *Hopwood* v. *Smith*, 170 Mass. 428. In that case the defendant defaulted on his recognizance. He then secured a discharge in insolvency which prevented judgment in the original action. Suit was brought against Smith, the surety, on the bond, and judgment was entered thereon for the penal sum, but execution issued for merely nominal damages, there being nothing due from the debtor because of the discharge in insolvency, although there was a technical breach of the recognizance. In that case, as in the case at bar, judgment was entered for the penalty, and in *Parkman* v. *Bartlett*, 173 Mass. 475, where judgment was obtained against the debtor in the original suit, in the action on the recognizance judgment was entered against the surety for the penalty, and execution was ordered for the amount of the judgment in the original action. The presiding judge, there-

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fore, could not rule as requested by the defendant, and judgment was properly entered for the penal sum.

The propriety of the entry of a single judgment covering both counts and the penal sum of both bonds, was not raised or discussed in this court, and we do not consider it.

In accordance with the terms of the report, the finding of the court is affirmed.

So ordered.

C. J. Muldoon, Jr., for the defendant.

C. F. Eldredge, for the plaintiff.

CLARENCE A. PARTRIDGE *vs.* MIDDLESEX AND BOSTON STREET RAILWAY COMPANY.

Middlesex. March 15, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Street railway. *Witness*, Examination: leading questions. *Practice, Civil*, Exceptions, Conduct of trial. *Evidence*, Opinion.

In an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon, when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," the plaintiff in order to recover must prove that the noise was unusual, unnecessary and likely to frighten horses, or that the defendant's motorman knew or ought to have known of the manifestation of fright in season to make a reasonable effort to diminish it and that he failed to do so, or else that the motorman's use of the gong was of such a reckless and wanton character as to indicate a disregard of the plaintiff's safety in the street.

In this Commonwealth the admission of leading questions in the direct examination of a witness is within the discretionary power of the judge presiding at the trial and, at any rate when confined to reasonable limits, is not subject to revision by exception or otherwise.

In an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," interrogatories propounded in a deposition to the motorman who was operating the car at the time of the accident properly may be allowed by the presiding judge in the exercise of his discretion asking the witness, whether the horse appeared to be

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frightened at any time before the accident, whether the witness had any intimation that the horse was likely to become frightened and to shy at the car, and whether the driver of the horse did anything to warn the witness that the horse was or was about to become frightened; because the witness's personal knowledge of the horse's manifestation of fright was or might be a material fact as bearing upon the character of his act in continuing to sound the gong.

Such witness also as a matter of discretion properly may be allowed to be asked on his direct examination whether or not there was any unusual or unnecessary ringing of the gong or blowing of the whistle at any time before the accident as alleged in the plaintiff's declaration, and may be allowed to answer that there was none, the conclusions of fact involved in this answer and in the answers to the other questions described above not being a sufficient reason for their exclusion.

TORT for personal injuries alleged to have been received by the plaintiff on the morning of November 20, 1907, while he was driving in an express wagon along Main Street in Cochituate, from his horse becoming frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant that was coming up behind him, whereupon the plaintiff's horse shied, throwing the plaintiff out and injuring him. Writ dated October 9, 1912.

In the Superior Court the case was tried before *Quinn*, J. The defendant offered in evidence the deposition of one Jennison, then a resident of Los Angeles in the State of California, who was the motorman that was operating the car of the defendant at the time of the accident. The interrogatories to this witness, which with the answers to them were admitted by the judge against the plaintiff's exceptions, that were taken informally as stated in the opinion, were as follows:

Interrogatory 11. "Did the horse appear to be frightened at any time before the accident?" Answer, "It did not."

Interrogatory 12. "Did you have any intimation that the horse was likely to become frightened or to shy at the car?" Answer, "I did not."

Interrogatory 13. "Did the driver of the team do anything to warn you that his horse was, or was about to become frightened?" Answer, "He did not."

Interrogatory 14. "State whether or not there was any unusual or unnecessary ringing of the gong or blowing of the whistle at any time prior to the accident as alleged in the plaintiff's declaration." Answer, "There was none."

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"The case was submitted to the jury under proper instructions and a verdict was rendered for the defendant." The plaintiff alleged exceptions, and the sentence last quoted is taken from the bill of exceptions.

W. R. Bigelow, (*L. L. Green* with him,) for the plaintiff.

P. F. Drew, (*W. U. Friend* with him,) for the defendant.

PIERCE, J. It is alleged in the bill of exceptions that while the plaintiff was driving a horse attached to an express wagon along Main Street in Cochituate it became "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," and that as a result the horse shied, throwing the plaintiff out of the wagon and injuring him.

The mere ringing of a gong on an electric car in a public street is not in itself negligence. *Henderson* v. *Greenfield & Turner's Falls Street Railway*, 172 Mass. 542. When the noise of such ringing is alleged to have frightened a horse, the plaintiff, to recover damages for injury resulting therefrom, must establish that the noise was unusual, unnecessary and likely to frighten horses, or that the motorman knew or ought to have known of the manifestation of fright in season to make reasonable effort to diminish it and failed so to do; *Ellis* v. *Lynn & Boston Railroad*, 160 Mass. 341; or that the motorman in the use of the gong was reckless or wanton to a degree that indicated disregard of the plaintiff's safety in the street. *Aiken* v. *Holyoke Street Railway*, 184 Mass. 269.

The case was submitted to the jury "under proper instructions," and a verdict was rendered for the defendant.

During the course of the trial the defendant offered in testimony interrogatories numbered 11, 12, 13, 14, and the answers thereto contained in a deposition. The plaintiff objected to the introduction of this testimony on the ground that the questions were leading and called for conclusions. The testimony was admitted and exceptions thereto were saved, although informally taken. Exceptions were saved to all the questions because leading.

The admission of leading questions in this Commonwealth rests in the discretion of the presiding judge and is not subject to revision or exception. *Moody* v. *Rowell*, 17 Pick. 490, 498. *York* v. *Pease*, 2 Gray, 282, 283. *Green* v. *Gould*, 3 Allen, 465. *Francis* v.

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Rosa, 151 Mass. 532, 535. And, were it to be held that the exercise of such discretion is to be confined to reasonable limits, there is nothing to justify the conclusion that such bounds were overstepped in the present case. See *Commonwealth* v. *Dorr*, 216 Mass. 314, 318.

Moreover, as to interrogatories 11, 12 and 13 the witness's personal knowledge of the horse's manifestation of fright was or might be a material issue, — an issue quite distinct and distinguishable from that reasonable cause to know which a jury may impute to a man placed as this man was. *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232. *Ahearn* v. *Boston Elevated Railway*, 194 Mass. 350.

The objection that the answers to the questions involve conclusions of fact is not tenable. So far as they do, such result is not objectionable because any canon of evidence is violated. The principle upon which such testimony is admissible is clearly stated in *Commonwealth* v. *Sturtivant*, 117 Mass. 122, and *Whittier* v. *Franklin*, 46 N. H. 23.

Exceptions overruled.

ELIZABETH A. THOMPSON *vs.* UNITED LABORATORIES COMPANY.

WILLIAM H. THOMPSON *vs.* SAME.

Suffolk. March 16, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Dangerous occupation, Employer's liability.

In an action against a corporation called a laboratories company, manufacturing among other things antiseptic powders and rat poison, for illness and suffering alleged to have been caused by being poisoned when the plaintiff was seventeen years of age and was employed in the defendant's factory, there was evidence that the plaintiff, after working about four months in the defendant's dry filling department, was transferred to the rat poison filling department in the basement, where there was very little ventilation and where the plaintiff's duty was to put the rat poison into cans, that the rat poison contained about twenty per cent of arsenic and was so volatile that a palpable visible dust, which easily was inhaled, filled the confined space in which the plaintiff worked and settled upon her hair and clothing, that the defendant put labels on the cans in

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which the rat poison was stored calling it deadly poison, that no warning was given to the plaintiff, that the forewoman under whom the plaintiff worked assured her that the rat poison was "like the other insect powders" and that, when the plaintiff suffered from symptoms of arsenical poisoning and complained to the forewoman, she was told by her that these symptoms were caused by a cold in the head and not by the rat poison. There was evidence that the defendant knew that the plaintiff and a girl who worked with her had become more or less ill as often as they worked in contact with the rat poison and that they had revived when relieved from so working. *Held*, that there was evidence for the jury on which they could find that the plaintiff failed to understand the danger to which she was exposed, and that, although the conditions were known, the danger involved was not obvious and the plaintiff did not assume the risk of the injury she suffered.

In the case above stated, it also was *held*, that it could be found that the defendant was negligent in failing to warn the plaintiff that she might be poisoned by inhaling the dust from the volatile mixture she was told to put into cans, and that the jury could find that the defendant should have foreseen that injury in some form at some time probably would occur to some one engaged in what might be found to have been a business dangerous to the persons employed.

PIERCE, J. These two cases were tried together; one brought by the minor plaintiff, who sued for personal injuries received by her while in the employ of the defendant, and the other for loss of services and expenses. They are considered together, as the right of the father is dependent upon the right of his daughter. *Regan* v. *Superb Theatre, Inc.* 220 Mass. 259, 261. The only exceptions taken at the trial were to the refusal of the presiding judge * to direct a verdict for the defendant. Hence the only question presented to this court is whether in any aspect of the evidence the jury were warranted in finding the defendant guilty and the minor plaintiff not guilty of negligence which caused the injury complained of.

The jury were warranted in finding that the minor plaintiff, who was born on August 29, 1894, entered the employ of the defendant in its dry filling department in March, 1911; that after she had worked in this department from March, 1911, until July 17, 1911, on the last named day she was transferred to the rat poison filling department in the basement; that this department occupied spaces cleared temporarily among the packing cases which reached almost to the ceiling; that the windows there were high up and were nailed so that they could not be opened, and that the only ventilation was

* *King*, J.

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from a door some fifty feet away, which was not always open; that the rat poison contained nineteen and five hundredths per cent of arsenic; that as used it gave off a dust at times sufficient to cause the girls' hair to appear white and sometimes they wore paper caps to keep it out of their hair; that it was volatile and might be inhaled easily under the conditions existing in this department. During the months of July, September, October and December, 1911, the plaintiff worked at intervals nearly five full days in this last named department. The work consisted in placing the loose arsenical powder in two ounce cans, and from two thousand to four thousand cans were filled each day, "enough arsenic, if taken internally, to make a fatal dose for over eighty thousand people." When directed to work on rat poison she "inquired whether it was poisonous or not and was told by the forelady, 'No; it was like the other insect powders' (which, from the defendant's formulas, contained no ingredients that would be poisonous)."

The plaintiff testified that no other warning was given her, and no testimony appears in the record to the effect that this statement was not true. One Hadley, the superintendent of the defendant's factory, testified "that he knew, before the plaintiff was put to work on rat poison, that it contained a considerable percentage of arsenic, which he knew was poisonous; that he prepared a label calling it deadly poison; that he frequently saw the girls working on the poison in the basement; that it never occurred to him that it might be inhaled, or that minors might be ignorant of the possible results that might follow from inhaling it; that he himself gave, or caused to be given, no warnings to any employees about how the same should be handled to avoid injury to themselves; that he simply told the foreman of the department to 'inform them to be a little careful;' that no special instructions were given about warning young girls; that he considered it the duty of the foreman to do this himself, and not to delegate it to the forelady; that respirators were furnished men who worked on mixing antiseptic and non-poisonous powders, but none was given to the sixteen to seventeen year old girls who were put to work on rat poison; that no fans or suction blasts that might draw off the poisonous dust were furnished because he 'didn't think they were necessary;' that the only chance that there would be that plaintiff would be warned was through the foreman; that no notices, except as afore-

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said, were posted or given the employees; that he later told plaintiff's father that she couldn't have been poisoned in the dry filling department." The foreman, Hilton, testified that "he knew arsenic was poisonous; that the work [of] filling the cans with rat poison was rather dusty;" and "that he never warned Miss Thompson [the minor, plaintiff] personally, as to any danger that might arise from working on rat poison." William H. Warren, a witness for the plaintiff, testified "that he had been educated at Harvard and Heidelberg Universities; that he had received the degree of Ph.D. from Harvard University in chemistry; that he had served as managing chemist for some years in a large wholesale and manufacturing chemical house in New York, that he had been professor of chemistry in Washington University, and now held a similar chair in Wheaton College; that he had specialized in poisons; that he had made tests of the mixture in question in this case and found that it was volatile and might be inhaled easily under the circumstances described as those under which plaintiff worked;" and "that from his experience he considered the conditions described as those under which she worked were unsafe."

From the plaintiff's testimony it appeared that the day after she was set at work in the rat poison department she, with another girl who worked with her, "suffered from nose bleed, smarting eyelids, and thirst; that she laid these to her work on rat poison of the day before and told the forelady, who told her that all she had was a cold in the head, and convinced her that she was wrong; that the same symptoms reappeared when she worked on the rat poison later on, but would disappear as soon as she stopped," and that in December "they became worse." Later, on March 17, 1912, and until the fourth day of May following, she was laid up at home suffering from a rash and boils.

There was testimony from her medical witness, as also from those of the defendant, that her symptoms were consistent with arsenical poisoning from arsenic contained in the rat poison in which she had worked.

The defendant's contention was that "All the conditions surrounding the plaintiff's employment including the places where she did her work, the materials and implements with which she did her work, and the method or manner of doing her work, were the same throughout her entire employment by the defendant."

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The defendant argues in effect that the plaintiff assumed the risk incident to the handling of a compound nearly twenty per cent of which was arsenic, so free, so volatile, that a palpable, visible dust filled the confined space in which she worked and settled upon her hair and clothing. These conditions she knew, but she did not understand, nor, without experience and a scientific knowledge which there is no evidence that she possessed, could she be aware of the hazards to which these conditions exposed her. While the conditions were known, the danger incident thereto was not obvious. Risks which are obvious only to those possessing scientific knowledge are not assumed. *Cox* v. *American Agricultural Chemical Co.* 24 R. I. 503. *Neal* v. *Phoenix Lumber Co.* 64 Wash. 523. Moreover she was told when set to work by the forewoman, whom she was bound to obey, that the powder was not poisonous. To some extent at least she had the right to rely on that statement. *O'Brien* v. *Nute-Hallett Co.* 177 Mass. 422. And the jury, in passing upon the question of her due care and assumption of the unusual risks incident to obvious conditions, had the right to take such an assurance of safety into consideration.

The defendant further contends that upon all the evidence it cannot be asserted as matter of law that the plaintiff could or would be poisoned by the inhalation of dust containing arsenic, and therefore that it is not bound to foresee results of which common experience would not warn it and which only a specialist would apprehend. See *Hubbell* v. *Yonkers*, 104 N. Y. 434. This contention finds no support in the law as applied to the facts of this case. As a matter of fact it knew that the compound contained a large percentage of arsenic; it knew that it was poisonous; it put a label upon the cans in which it was stored, calling the attention of those into whose hands the preparation might come to the fact that the contents of the container were a deadly poison. It knew that the plaintiff and a girl who worked with her became more or less ill as often as they worked in contact with the preparation and revived when relieved from so working. Surely these facts are not consistent with excusable ignorance of the danger to the health and life of infant employees lurking in circumambient poisonous dust.

As matter of law a master engaged in a business inherently dangerous to the life and health of employees is bound "to become

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informed of those matters of scientific knowledge possessed by men of general education and information relative to the danger and hazard of the business in which he is engaged." *Hysell* v. *Swift & Co.* 78 Mo. App. 39, 49. *Latorre* v. *Central Stamping Co.* 9 App. Div. (N. Y.) 145. It is clear from the testimony of Professor Warren that an investigation would have disclosed the fact that the mixture was volatile, might be inhaled easily under the conditions obtaining in the defendant's place of business, and so handled was unsafe.

The defendant, admitting that a warning was not given, insists that a warning would have been of no avail because the plaintiff had no way of knowing that the inhalations might poison her, and because the purpose of a warning is to enable the employee to work in safety. But a warning of an unknown and unexpected danger affords also an opportunity to the employee to determine whether the contract of employment shall be enlarged to include what is to him a new situation, or whether it shall be abandoned. Considering the nature of a contract of employment, and in connection therewith the frequent hardship of the application of the doctrine of the assumption of the risk, it would seem that the later consideration is the basic reason for requiring a warning. It is not necessary that the person to be harmed or the form which the injury shall assume should have been foreseen. "It is enough that it now appears to have been a natural and probable consequence." *Hill* v. *Winsor*, 118 Mass. 251. *Ogden* v. *Aspinwall*, 220 Mass. 100.

In the case at bar the jury properly could find that the defendant should have foreseen that injury in some form, at some time, probably would occur to some one of the persons engaged in what might be found to be to them a most dangerous business.

No error appears in the submission of the cases to the jury.

Exceptions overruled.

E. C. Stone, for the defendant.

J. F. Neal, for the plaintiffs.

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CATHERINE SHEA, administratrix, *vs.* AMERICAN HIDE AND LEATHER COMPANY.

Middlesex. March 16, 17, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability. *Statute*, Construction.

At the trial of an action by an administrator under St. 1909, c. 514, §§ 127, 128, and at common law for negligently causing the suffering and death of the plaintiff's intestate when in the defendant's employ before the workmen's compensation act took effect, where there is evidence that the intestate was set at work by the defendant's superintendent upon a drum-setting machine used for smoothing and straightening rough leather, that the machine was defective and was known to the superintendent to be so, and that the superintendent gave the intestate no warning or information in regard to the defects, that the defective condition of the machine was not apparent when the intestate went to work and did not disclose itself until the fourth working day of his employment, when the cylinder flew out and struck the intestate on the head and chest, throwing him on his back and causing his suffering and death, the plaintiff is entitled to go to the jury and it is right for the presiding judge to refuse to order a verdict for the defendant.

At the trial of the action above described it was error, at least as applying to the common law counts of the declaration, for the presiding judge to refuse a request of the defendant to rule that the defendant owed the plaintiff's intestate no duty to change or improve the condition of the machine on which the intestate was set at work and that the defendant's only duty to him was to warn him in regard to any dangers in connection with the use of the machine that were not obvious.

St. 1909, c. 363, § 1, which provides that "If a defect in the ways, works or machinery of a person, partnership or corporation, has been reported to the person whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence, and such defect is not remedied within a reasonable time, and by reason of said defect an employee is injured, such employees shall not be held to have assumed the risk of such injury," is not to be interpreted to apply to a case where the report of the defect to the employer was made before the injured workman was employed.

It seems that, to bring a case within the statute quoted above, the report of the defect must have been made by the injured employee himself or in some way in his behalf.

PIERCE, J. This was an action of tort brought by Catherine Shea of Woburn, as the administratrix of the estate of the late Edmund Shea of Woburn, for the conscious suffering and death of the plaintiff's intestate owing to the alleged negligence of the de-

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fendant on April 29, 1912. It was brought under Sts. 1909, c. 514, §§ 127, 128; two counts under clause 1 and clause 2 respectively of § 127 being for the injury and conscious suffering, and two counts under clause 1 and clause 2 of that section being for the death after conscious suffering. There also were joined in the same action three counts at common law for the conscious suffering. All exceptions to the admission of evidence other than the first taken are waived in the defendant's brief.

It is now conceded that the testimony objected to in the first exception was admissible in so far as it tended to show what the condition of the machine was at the time the intestate entered the defendant's employ. As the testimony was properly admissible for a limited purpose, and as the exception when taken was a general one, it follows upon familiar principles that the exception must be overruled.

At the conclusion of the plaintiff's evidence the defendant offered no evidence, but asked the judge to order a verdict for the defendant, which the judge * refused to do, and the defendant excepted.

The motion for the ordering of a verdict is analogous to an oral demurrer to evidence. *Murphy* v. *Russell*, 202 Mass. 480. The mover admits the truth of all facts which the jury might find in favor of the plaintiff, whatever the nature of the evidence. He admits that if the evidence conflicts, that of the plaintiff is true so far as it conflicts with his own. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. *Cohen* v. *Henry Siegel Co.* 220 Mass. 215. He admits that if the plaintiff calls several witnesses to prove the same transaction, some of whom testify unfavorably to him and others in his favor, the latter have told the truth. See Troubat & Haly's Practice (3d ed.) 509 as quoted in Tidd's Practice (4th Am. ed.) 865, note; *Copeland* v. *New England Ins. Co.* 22 Pick. 135; *Forsyth* v. *Hooper*, 11 Allen, 419; *Bothwell* v. *Boston Elevated Railway*, 215 Mass. 467, 475. The presiding judge also will make any inference of fact in favor of the party offering the evidence which the evidence warrants and which the jury, with the least degree of propriety, might have inferred. See cases cited above.

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* *Morton*, J. The jury returned a verdict for the plaintiff in the sum of $5,000, apportioned $1,000 for conscious suffering and $4,000 for the death.

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Applying the foregoing principles as rules of guidance in the determination of fact, it admittedly appears, or may be inferred, that the machine upon which the intestate was set at work was known as a drum-setting machine; that its function was to smooth and straighten rough leather; that its essential operative features consisted of a drum and cylinder driven by means of connecting pulleys and gears; that the cylinder occupied a place in a frame above and contiguous to the drum; that the cylinder was of cast iron, eight feet and eight and one half inches long, and weighed six hundred pounds; that a steel shaft ran through the centre of the cylinder and fly wheel pulleys were attached to its ends; that the shaft served as an axle, its journals and ends turning in babbitt metal lined boxes; that these two boxes were supported or hung on pivot points or box swivels; that they were movable or removable to permit of alignment with the axle journals of the cylinder; that when the cylinder was in position and the journal bearings and boxes in alignment the boxes were or should be securely held in fixed position by set screws; that the boxes were made in halves, in such form that their inner lined babbitt metal surfaces when the halves were joined, came nearly in contact with the circumference line of the enclosed and supported axle journal; that the upper half of the boxes or caps was fastened to the lower half by four cap screws; that the purpose of the boxes was to support the shaft or axle as it turned within them, and that of the cap, to prevent the cylinder's flying out as it revolved; that with boxes properly made, properly babbitted, properly placed, properly aligned and securely fastened to the frame of the machine, the cylinder could not fly out if the cap screws held the cap firmly in position; that without heating the bearings of the shaft fixity and immovability of the caps was a practical thing to attain by placing between the edges of the halves of the boxes a thin strip of leather or metal before the final tightening of the cap screws.

When the machine was not running the boxes and screws were visible to the workman as he stood at his place in front of the machine. When the machine was in operation a hood or bonnet came down over the front of the cylinder, to protect the workman from flying oil and filthy dirt, and so positioned hid from view the journal boxes. The maximum of safety, if the cylinder were properly balanced, was sixteen hundred revolutions a minute.

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There was ample evidence, indeed it is hardly disputed, that the journal boxes, particularly the box on the right hand side of the machine, had given great trouble and were the cause of serious anxiety and apprehension of harm to the changing operatives for more than a year preceding the accident which caused the intestate's death. The set screws which held the boxes in position frequently came out and fell to the floor. The cap screws loosened, and the axle, thus partially released from the restraint of the cap, rattled, quivered and vibrated. The vibration served in turn further to loosen the boxes, and the entire machine was unstable.

There were several causes for the loosening of the screws and cap: (1) the boxes as metal babbitted were unfit; (2) they were not properly babbitted and adjusted, the one half to the other; and (3) the cylinder was too long for the frame and as it revolved it pushed against the box cap.

When the machine was running and the noise of the shaft's vibration and rattling told the workman standing in his place at the front of the machine that the cap screws had become loose, the machine was stopped, the screws tightened, and then again set in motion. When the machine was at rest there was no visible sign to indicate that it was out of repair, unfit for the work it was to do, or dangerous to operate. Specifically the only way to learn of the loosened screws was through experience, touch or instruction.

On the day before the hiring of the intestate the operator refused to work longer upon the machine because of his belief in the danger from it. The superintendent endeavored to persuade the operator to resume work, but failing so to do he (the superintendent) sent for the intestate, who was out of employment and a man of experience in the working of leather-setting machines. The intestate came to work on the machine on Thursday, April 25, 1912, and was killed on Monday, April 29, 1912, by the cylinder flying out and striking him on the head and chest.

There was no evidence that any defect in the machine, or in any of its parts, or any unusual danger attendant upon its use, was pointed out or disclosed to him previously to or coincidentally with his hiring, or that he knew of such. There was evidence from which it may be inferred that the operator who last used it cleaned it before leaving it, and so far as he was able adjusted its parts and tightened all screws. There was, then, at the time of employ-

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ment no obvious danger. There was no evidence that during the three days of the intestate's work in connection with the machine the screws came out, or that any other defect was observed by the intestate or any one else.

On April 29, 1912, the intestate went to work at about a quarter before seven o'clock. He put on his apron, put a piece of leather upon the drum, and started the machine. The machine ran a few minutes; then the cylinder flew out, struck the intestate on the head and chest, and threw him upon his back. When found he lay with his feet toward the machine and the cylinder across his chest.

The defendant and its superintendent knew directly and inferentially, from the complaints of the workmen before the intestate's hiring, of the condition of the journal boxes of the machine, and refused or neglected to remedy the indicated defects. So far at least as the defendant's duty and the intestate's rights were concerned the defendant must be held to have known of the risk attending the use of such a machine, and as the defects were not known to the intestate or obvious to him or apparent to the senses of ordinary intelligent persons or the consequences and injury likely to follow from the defects perceivable to persons of ordinary intelligence and perception, it also must be held that the defendant failed in its common law and statutory duty to furnish the intestate with reasonably safe and suitable machinery and appliances.

The evidence would justify a finding that the superintendent had full knowledge of the defects and of the risks attending the use of the machine before and at the time of the hiring of the intestate, and also as well had knowledge of the intestate's ignorance thereof; and that he neglected to warn the intestate. *Lavartue* v. *Ely Lumber Co.* 213 Mass. 65. There was no evidence to show that the machine's defective condition became known to the intestate after his employment, or that knowing of it he appreciated the danger of injury to himself likely to flow therefrom.

The evidence would justify a finding that at the time of the accident the intestate was engaged in the performance of his contractual duty, and that no negligent act of his contributed to his injury. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276.

The presiding judge was clearly right in submitting the evidence

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to the jury and in refusing to rule that upon the evidence the plaintiff was not entitled to recover on counts 1, 2, 3, 4, 5, 6, 7, or any of them.

The ninth and tenth rulings requested by the defendant were as follows: "9. Whatever the jury may believe from the testimony of the plaintiff's witnesses that the condition of the leather or drum-setting machine was on the day that the plaintiff's intestate went to work for the defendant, the defendant owed the plaintiff no duty to change or to improve that condition of the machine; the plaintiff's intestate took the machine as it was at that time, whether good, bad, or indifferent, and the only duty which the defendant owed to the plaintiff's intestate was to warn him of any dangers in connection with the use of that machine which were not obvious.

"10. When the defendant hired the plaintiff's intestate to work on the leather or drum-setting machine, it was under no obligation to make the machine a better one or to change it in any other way. The plaintiff's intestate took it as it was. It was only in case there was some risk in connection with the use of the machine which was not obvious that any duty was thrown on the defendant, and the duty thrown upon him in such a case was to give a warning."

These requests were applicable at least to the common law counts.

The presiding judge in giving his charge forgot or overlooked either that there were in the declaration common law counts, or that there is a well established distinction between the contractual assumption of risk to which the requests for rulings manifestly were directed and that assumption of risk which, founded upon known and appreciated conditions, is nevertheless voluntarily and knowingly assumed. *Cullalucca* v. *Plymouth Rubber Co.* 217 Mass. 392. Whatever the cause, the judge in his charge ignored the subject matter of these requests.

The defendant was entitled to have the rulings given as instructions to the jury, at least in substance, and the refusal to give them was error. *Rivers* v. *Richards*, 213 Mass. 515, 519. The remaining requests for rulings were fully and adequately treated in the charge, and there is no just ground for complaint.

The presiding judge, at the request of the plaintiff, upon the

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question of the assumption of risk charged the jury as follows: "Edmund Shea, the intestate, cannot be held to have assumed the risk of a defective condition if that defect had been reported to the person whose duty it was to remedy it or cause it to be remedied and repaired; it is negligence if said defendant did not remedy it within a reasonable time. In other words, that instruction requires you in effect, if you find that this alleged defect was reported to some one whose duty it was to remedy it, if that is the fact, and you find that to be the fact, then assumption of risk does not apply to Shea."

There was evidence that upon several occasions considerably before the time of the employment of the intestate, two at least of the employees, while their work was upon the machine, had reported to the superintendent the existence of the specific defects in the machine which were alleged to be the cause of the intestate's injury and death, and that more than a reasonable time had elapsed before the intestate's employment within which the defects might have been remedied.

This ruling evidently was based upon an interpretation of the meaning to be given to the St. of 1909, c. 363, § 1,* which, in its literal terms, is sufficiently comprehensive to include the facts of the case at bar. Such an interpretation would include a complaint of a defective machine made years before the employment of any employee, with the result that no employee thereafter assumed the risk of a known or obvious defect. The reason for the enactment of the statute is well known, and the wrong thought to exist in the law is remedied by limiting its application to the person making the complaint, or at the most to persons or classes of persons on whose behalf the complaint was in fact made. We think that the statute should be so interpreted.

It follows that the charge in its interpretation of the statute was too broad, and the exception must be sustained.

The exceptions to the refusal to give the ninth and tenth requests

* That statute is as follows: "If a defect in the ways, works or machinery of a person, partnership or corporation has been reported to the person whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence, and such defect is not remedied within a reasonable time, and by reason of said defect an employee is injured, such employees shall not be held to have assumed the risk of such injury."

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and to so much of the charge as related to St. 1909, c. 363, § 1, are sustained; all other exceptions are overruled.

Exceptions sustained.

E. C. Stone, for the defendant.

E. J. Fegan, (*D. DeC. Donovan* with him,) for the plaintiff.

BENJAMIN RABALSKY *vs.* ABRAHAM LEVENSON & others.

Suffolk. March 22, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Sales of Merchandise in Bulk. Equity Pleading and Practice, Parties. *Assignment.*

Under St. 1903, c. 415, relating to sales of merchandise in bulk, a sale of all the merchandise and fixtures at the place of business of the seller, in which the parties honestly try to comply with the requirements of the statute but by mistake give notice only to the merchandise creditors of the seller and fail to prepare a list of and give notice to his general creditors as required by the statute, is voidable by the general creditors as to the merchandise, although it is good as a sale of the fixtures.

A general creditor of one who in selling his entire stock of merchandise failed to furnish a list of his general creditors to the purchaser so that the purchaser did not give notice of the sale to such creditors as required by St. 1903, c. 415, cannot procure the setting aside of the sale in a proceeding in which the purchaser is not made a party.

It seems that a *bona fide* assignee of a balance of the proceeds from a sale of merchandise in bulk, who took the assignment in part payment of a debt justly due to him from the seller, where the sale was voidable by the general creditors of the seller because notice of it was not given to such creditors as required by St. 1903, c. 415, is entitled to hold such balance against a general creditor who after the assignment institutes proceedings to avoid the sale.

BILL IN EQUITY, filed in the Superior Court on June 16, 1914, against the defendants named in the opinion, praying that they might be ordered to interplead and assert their several rights to a sum of $148 remaining as a balance in the hands of the plaintiff.

The case was heard by *Wait*, J., who filed a memorandum stating that the allegations of the bill were admitted to be true and finding further facts. The facts thus admitted and found are stated in the opinion.

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The judge made a final decree ordering that the plaintiff was entitled to retain for counsel fee in bringing this suit and for costs the sum of $30 from the funds in his hands amounting to $148, and that from the amount remaining the plaintiff should pay the sum of $84.14 to the defendants Nathaniel M. and Robert C. Levenson, doing business as Levenson Brothers; should pay to the defendant Edison Electric Illuminating Company of Boston the sum of $26.67; and should pay the balance then remaining, $7.19, *pro rata* on the costs of Levenson Brothers and of the Edison Electric Illuminating Company of Boston. The defendant Abraham Levenson appealed.

St. 1903, c. 415, is entitled "An Act to prohibit sales of merchandise in bulk in fraud of creditors." Section 1 of that act is as follows: "The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory, showing the quality and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms and conditions thereof."

The case was submitted on briefs.

J. J. Gaffney & A. Levenson, for the defendant Abraham Levenson.

W. T. Atwood, for the defendants Levenson Brothers.

M. L. Fahey, for the defendant Edison Electric Illuminating Company of Boston.

PIERCE, J. On May 19, 1914, the defendant Mandell sold to one Samuel Weisgold, who is not made a party to this bill, the merchandise and fixtures owned by him at 22 Cambridge Street

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in Boston. The purchase price was $850. Acting upon the advice and with the assistance of his attorney at law, the defendant Abraham Levenson, Mandell (the seller), in good faith and with an honest purpose to fulfill the requirements of St. 1903, c. 415, prepared and Weisgold (the purchaser) received a list of his (Mandell's) merchandise creditors; and thereafter, conforming to the statutory requirement, due notice of the sale was given to such creditors. Solely because of their mistaken interpretation of the statute they failed to prepare a list of, or to notify, the general creditors. These creditors were the defendant Levenson, with a valid claim of $320; the defendants composing Levenson Brothers, with a joint judgment obligation of $24.22, and a further claim of joint liability upon four promissory notes aggregating $37.48, There was also a joint indebtedness of $26.27 due to the defendant the Edison Electric Illuminating Company of Boston.

Upon the delivery of the merchandise and fixtures Weisgold placed in the hands of the plaintiff the entire consideration for the sale, $850, under an agreement between Weisgold, Mandell and the plaintiff that the plaintiff should pay therefrom all the merchandise creditors and should pay the balance, if any, to Mandell. In execution of this trust the plaintiff paid, in discharge of the claims of all merchandise creditors, the sum of $702, and thereupon the balance of $148 became due and payable to Mandell. With the execution of the trust Mandell gave, and Levenson received, in good faith, in partial payment of his claim of $320, an assignment in writing of any balance in the plaintiff's hands remaining after the payment of the merchandise creditors. Due notice in writing of this assignment was served on Rabalsky on or about May 20, 1914.

A trustee writ, in which were named the members of Levenson Brothers as plaintiffs, and those of Mandell Brothers as defendants, and the present plaintiff and the Cosmopolitan Trust Company were summoned as trustees, issued from the Municipal Court of the City of Boston, on May 22, 1914. On the same day (May 22, 1914) another writ issued from the Municipal Court and was duly served. In this writ the Edison Electric Illuminating Company of Boston was named as plaintiff, the members of Mandell Brothers were named as defendants, and Rabalsky, the present plaintiff, and the Cosmopolitan Trust Company were summoned as trustees.

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Notwithstanding the good faith of all parties and their honest effort to comply with the law, they failed to do so; and the sale of the stock of merchandise, but not that of the fixtures, was voidable by the creditors. *Gallus* v. *Elmer*, 193 Mass. 106. *Kelly-Buckley Co.* v. *Cohen*, 195 Mass. 585. *Adams* v. *Young*, 200 Mass. 588.

There were open to the creditors a number of remedies both at law and in equity, but, omitting the right of seizure on execution, no one of them could be pursued successfully without an adjudication to which the purchaser was made a party. It was entirely possible, by trustee process, to make the purchaser a trustee or garnishee. *Thomas* v. *Goodwin*, 12 Mass. 140. *Burlingame* v. *Bell*, 16 Mass. 318. *Hastings* v. *Baldwin*, 17 Mass. 552, 557. As to the effect of payments by the grantee of indebtedness of the grantor, see *Pierce* v. *Le Monier*, 172 Mass. 508; *Adams* v. *Young*, 200 Mass. 588, 591.

As above stated, the purchaser, Weisgold, was not made a party to this bill, nor was he summoned as trustee in the action at law. In the trustee process the depositary was named as trustee, and the only way he was chargeable was by an adjudication that he held in his hands and possession the goods, effects and credits not of Weisgold, but of the debtor Mandell. He confessedly did hold money payable to Mandell, but that money, at the time of the service of the trustee process, was assigned to Levenson to pay a claim justly due in excess of the sum so held. Because of the assignment he could not have been charged in trustee process, and he was bound in law to recognize the assignment and to pay over the money remaining as a balance in his hands to the *bona fide* assignee.

It follows that the decree of the Superior Court must be reversed and a decree must be entered directing the plaintiff to pay the balance in his hands, $148, to the assignee Levenson.

Ordered accordingly.

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INHABITANTS OF BOURNE *vs.* JOINT BOARD OF PUBLIC SERVICE COMMISSIONERS AND HARBOR AND LAND COMMISSIONERS & another.

Suffolk. March 23, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Cape Cod Canal. Boston, Cape Cod and New York Canal Company.

Although, in St. 1899, c. 448, § 14, relating to the providing and maintaining of suitable ferries or bridges across the Cape Cod Canal by the Boston, Cape Cod and New York Canal Company at points designated by the county commissioners, no provision is made for plans or supervision of plans nor is authority conferred in terms upon any one to determine that the company shall provide and maintain any ferry, bridge or tunnel, the provisions of § 6 of the statute, that the company shall make such construction for crossing the canal as the joint boards of the public service commission and the harbor and land commission may order and under their supervision and subject to plans approved by them, must have been intended to be incorporated in § 14.

It was within the power and authority of the joint boards of the public service commission and the harbor and land commission, acting under Sts. 1899, c. 448; 1910, c. 519, to order the Boston, Cape Cod and New York Canal Company to provide and maintain a temporary ferry at Station 181, and to approve plans for its construction.

PETITION, filed on July 10, 1914, and afterwards amended, for a writ of certiorari quashing certain proceedings of the public service commission and the harbor and land commission sitting as a joint board under Sts. 1899, c. 448; 1910, c. 519, namely, an order determining that a crossing over the Cape Cod canal at Station 181 should be by means of a suitable temporary ferry and a vote approving certain plans for such a ferry.

The Boston, Cape Cod and New York Canal Company also was made a respondent and the petition prayed that it might be enjoined from providing, constructing or erecting a temporary passenger ferry in accordance with the order and vote, and from destroying a certain bridge across the canal location near Station 181. An application for the injunction was denied.

The case was heard by *Braley*, J. It was agreed that at the time of the filing of the petition the respondent company already had constructed the approaches and landings prescribed by the order

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and vote of the joint board, that the ferryboat thereby prescribed practically was completed, and that after the application for a temporary injunction in this case was denied the respondent company had completed the destruction of the existing bridge and in accordance with the above described order and the plans of the joint board had established a ferry for passengers which it had since maintained.

The single justice at the request of the parties reported the questions of law raised by the petition as amended, the answers and the agreed facts for determination by the full court.

The material facts are stated in the opinion.

J. Walsh, for the petitioner.

R. G. Dodge, (*J. L. Motley* with him,) for the respondents.

PIERCE, J. We assume, without deciding, that the inhabitants of the town of Bourne in their corporate capacity have sufficient legal interest in the subject matter of the report to justify its petitioning for a writ of certiorari.

The only question is: Did the joint board of public service commissioners and harbor and land commissioners exceed the power conferred upon it by c. 448 of St. 1899, and c. 519 of St. 1910, in adjudicating "that a crossing of said canal at . . . [a] point designated by the county commissioners of Barnstable County on the fifth day of December, 1910, shall be by means of a suitable temporary passenger ferry," and in ordering, in pursuance of its decision, "That said canal company [the respondent] file with this joint board a plan of said temporary ferry, and that when a plan for the same in form approved by the engineer of the joint board be filed, a temporary ferry at said point be approved by this joint board. Provided, however, that if in the future, in the judgment of this joint board, some other method of crossing at this point is required, said canal company shall build the necessary structures and maintain and operate the same in conformity with such plans and orders as may be approved and issued by this joint board."

Section 6 of c. 448, St. 1899, provides for the crossing of the canal by tracks of the Old Colony Railroad Company. It expressly provides that "Said canal company shall construct its canal with such structures and appliances for its protection and use as said joint board may order, together with such bridge or bridges, tunnel or tunnels, ferries, and changes of highways, under the supervision

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of said joint board, as shall be in accordance with plans approved by them and in conformity with such orders as they may make; and the Supreme Judicial Court shall have jurisdiction in equity to enforce such orders." St. 1910, c. 519, § 1, provides: "and when said joint board has considered and determined a method of crossing the canal suitable for railroad or highway traffic at certain designated points as provided in said act [St. 1899, c. 448], the power and authority of said joint board shall not thereby be limited or exhausted, and it may thereafter under the provisions of said act consider and determine the method of crossing at other points of crossing for highway traffic, in the method provided in said act." Section 14 of c. 448, St. 1899, reads: "Said canal company shall provide and maintain in the towns of Bourne and Sandwich, at such points as may be designated by the county commissioners, suitable ferries or bridges across the canal, or a suitable tunnel or tunnels under the same, for passengers and vehicles, to be operated free from tolls, under reasonable rules to be established by the county commissioners, except that the canal company shall not be required to maintain a ferry if a highway, bridge or tunnel shall be built at or near any of said points."

No provision in this section (§ 14) is made for plans or supervision of plans, nor in terms is authority conferred upon any person, persons or body of persons to determine that the canal company shall provide and maintain at the point or points designated by the county commissioners a ferry, a bridge, a tunnel, or either of them. It does provide that the ferry, bridge or tunnel shall be operated under reasonable rules to be established by the county commissioners.

It is not probable that the Legislature intended to leave so important a matter as plans and supervision of construction under plans to the uncontrolled discretion of the canal company. The authority of supervision and direction in all other matters relating to railway and highway traffic as well as to the location and construction of ways, is expressly conferred upon the joint board; and it is fair to assume that the general provisions of § 6 were intended to be read into § 14, and we so interpret the statute.

The point at Station 181 in the village of Bournedale being designated by the county commissioners under the authority of § 14, the joint board had jurisdiction under § 6 to adjudge that the canal

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company should provide and maintain at that point either a ferry, a bridge, or a tunnel, as it should deem to be for the best public interest, in that it was most conducive to public safety and convenience. Unless restrained by positive law, — and none such has been called to our attention, — the joint board had authority to ascertain by trial and experiment what form of ferry, bridge or tunnel would be adopted, and how the traffic should be regulated. To this end the establishment of a suitable temporary ferry manifestly was within its power.

Petition dismissed.

MARY MACKEY *vs.* ADALINE J. LONERGAN.

Middlesex. March 24, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Of one owning or controlling real estate, Invited person. *Landlord and Tenant.*

One who is in a building by the invitation of a tenant has no greater right of recovery against the owner of the building for personal injuries suffered by him by reason of the condition of the premises than the tenant would have if he were so injured.

In an action for personal injuries suffered when the plaintiff, in entering a building in a city owned by the defendant at the invitation of one who was a tenant at will of the defendant under an agreement which gave entire control of the premises to the tenant and required him to make all ordinary repairs, fell down an unguarded flight of stairs immediately at the right of the entrance, there was evidence tending to show that the position and unguarded character of the stairway were dangerous, that the stairway was constructed as it was in violation of a permit of the building department and of an ordinance of the city and that, if it had been constructed in accordance with the permit issued to the defendant, it would not have been dangerous; that such construction had been done before the beginning of the tenancy of the person by whose invitation the plaintiff was on the premises, and that the premises had not been changed since. *Held*, that there could not have been any recovery by the tenant if he had been injured as the plaintiff was, and that therefore the plaintiff could not recover.

TORT for personal injuries suffered by reason of falling down a flight of stairs in a building in Cambridge owned by the defendant and occupied by one John T. Keane as a tenant at will. Writ dated February 11, 1913.

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The declaration as amended was in three counts. The first count alleged that the cause of the plaintiff's fall was the negligent maintenance by the defendant of an unfit, unsafe and dangerous passageway into the premises in question and of an unprotected, unguarded and unsafe flight of stairs in the passageway. The second and third counts alleged that the maintenance of the passageway and the unguarded, unprotected and unsafe flight of stairs constituted a nuisance or trap.

At the trial in the Superior Court before *Fessenden*, J., there was in evidence chapter 13 of the Revised Ordinances of Cambridge relating to the issuing of permits by the superintendent of the building department for the construction or alteration of buildings, section 12 of which provided as follows: "No building, structure or foundation shall be constructed or altered without a permit, and such work shall be done in accordance with drawings bearing the approval of the superintendent."

There was evidence tending to show that the building in which the plaintiff fell had been built by the defendant three years and a half before the accident; that, as the plaintiff, an elderly woman, entered the premises through the outer door, the door opened inward from its right and there was a flight of stairs inside going downward at its immediate right parallel to the outer wall of the building; that the plaintiff did not know of these stairs; and that, as she stepped through the doorway she stepped down these stairs, fell and was injured.

It appeared that the permit issued by the superintendent of the building department of Cambridge to the defendant required that the door in question should open inward from its left, the hinges being on its right side, that the stairs should not go downward from the right of the doorway, but that they should be a curved flight starting from a point away from this outer wall, going toward it and then turning as they descended to run parallel with the wall at the bottom.

It appeared that Keane occupied the premises as a tenant at will of the defendant under an agreement whereby the entire control of the premises was given to Keane who was to make all ordinary repairs and that he had been a tenant of the defendant for about a year.

The other material evidence is described in the opinion.

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At the close of the evidence, the judge ordered a verdict for the defendant and reported the case for determination by this court, judgment to be entered for the plaintiff in the sum of $1,500 if the case should have been submitted to the jury; otherwise, judgment to be entered for the defendant.

T. F. Murphy, for the plaintiff.

E. C. Stone, for the defendant, was not called upon.

CARROLL, J. The plaintiff was injured upon the premises of the defendant which were used by the defendant's tenant as a pool room and bowling alley. In the employ of the tenant was a young boy who made his home with the plaintiff. On Saturday, December 7, 1912, at about twelve o'clock, the plaintiff walked from her home to the bowling alley, to tell the boy to come to his dinner. The door leading to the pool room was at the head of a stairway, and as she opened the door, being unfamiliar with the place, she stepped on the top of the stairway and fell to the bottom, receiving injuries on account of which this action is brought.

When the plaintiff entered the premises of the defendant, she was there either as a licensee or as one invited. Making the most favorable assumption in favor of the plaintiff, then at most she was an invited guest of the tenant, and as such, she has as against the landlord the same right that the tenant himself had, but no greater rights than his. The plaintiff having been invited to the premises by the tenant, and the premises having been in the same condition at the time of her injury that they were at the time of the contract of hire, the landlord is not liable. The plaintiff was not injured on a common passageway where the control remains in the landlord and the obligation is upon him to maintain such passageway in the condition it appears to be in at the time of the letting. *Andrews* v. *Williamson*, 193 Mass. 92. And there was no contract on the part of the landlord to keep the premises in repair, and a negligent failure on his part to carry out this agreement. *Galvin* v. *Beals*, 187 Mass. 250. Nor was there an agreement to keep the tenement in a safe condition for the use of the tenant, as explained in *Miles* v. *Janvrin*, 196 Mass. 431. It is the ordinary case where a store is leased with no express assurance on the part of the landlord that the premises are safe, and where the law implies no such assurance, where the tenant is like a purchaser with no implied warranty of fitness, or where, in the absence of fraud,

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he takes the premises as he finds them and the landlord is not responsible, either to him or to his guests or patrons, for any injury which happens thereon.

The plaintiff therefore cannot recover. The verdict was rightly ordered for the defendant; and in accordance with the terms of the report, judgment is to be entered for the defendant.

Ordered accordingly.

NETTIE E. HARRINGTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 24, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Elevated railway, In a station.

At the trial of an action against an elevated railway company for personal injuries received by a woman, as she was attempting in the night time to board a car in a train of the defendant at a station, by reason of falling into a space fourteen inches wide between the station platform and the door of the car, there was evidence that the plaintiff had travelled by elevated trains but infrequently and that when she had done so she had observed that the space between the cars and the platform had been four or five inches; that several persons preceded her into the car and that immediately in front of her was a woman with a long skirt which covered the open space so that in a dim light which prevailed the plaintiff was misled into thinking that the skirt was the floor of the car; and that there was nothing in the attitude of the defendant's employees to indicate to the plaintiff her danger. It appeared that the space of fourteen inches was not the ordinary space between the platform and the car, but that it was the result of temporary conditions incident to a necessary change of construction of the station and tracks. There was expert testimony to the effect that leaving the fourteen inch space was not a reasonably proper construction, and that reasonable methods might have been used to reduce that space. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury.

TORT for personal injuries suffered, when the plaintiff was attempting to board a train of the defendant at its elevated station at the North Station in Boston, by reason of falling between the platform and the train. Writ dated January 14, 1910.

In the Superior Court the case was tried before *Pratt*, J. At the close of the evidence, which is described in the opinion, the

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judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which, after the death of *Pratt*, J., were allowed by *Wait*, J.

H. W. Packer & J. W. Allen, for the plaintiff.

J. T. Hughes, for the defendant.

PIERCE, J. On November 7, 1908, just before midnight, the plaintiff, while boarding a train of the defendant at its elevated station at the North Station, fell into the space between the platform of one of the defendant's cars and the station platform, and received the injuries complained of. At the close of the evidence the trial judge ruled that "there was not sufficient evidence to entitle the plaintiff to have the case submitted to the jury," and ordered a verdict for the defendant. To this ruling and order the plaintiff duly excepted. Exceptions also were taken to the admission and exclusion of certain offered testimony, but these exceptions were not argued and are treated as waived.

The plaintiff left her place of employment at about 11.30 or 11.40, P. M., in company with a Mrs. Wallace and a Miss McSherry, to go to her home. She was wont to travel by surface cars, but on this night she went with her two companions to take the elevated train at the North Station. They ascended the stairs, paid their fares, and passed to the platform on the side used by south bound trains. A train soon arrived, and Miss McSherry boarded the first car by the rear door. She was followed by a number of persons, both men and women. Then came the plaintiff and behind her Mrs. Wallace. Directly in front of the plaintiff was a woman wearing a long dress. Stepping naturally, the plaintiff also attempted to enter the car by this rear door. The dress of the woman immediately preceding her so covered the step that the plaintiff failed to see it. She thought in the dim light that she was stepping on the car step, but as a matter of fact she would have stepped on the dress had it stayed there an instant longer. Mistaking the dress for the step of the car, her step was too short and she stepped into the space, which might be found to have been at least fourteen inches between the car and the station platform. She never before had embarked from this temporary platform, which had been in use in connection with the running of trains only since October 8, 1908. Before the time of her injury she had occasionally ridden on an elevated train, but had not been upon the

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elevated platform at the North Station for about two months before November 7, 1908. At these times she observed that the distance between the cars and the permanent station platform was perhaps four or five inches.

We have the case of a person perceiving nothing in the attitude of attendant servants or in the conduct of those about her to indicate the need of special care. *Plummer* v. *Boston Elevated Railway*, 198 Mass. 499. *Brisbin* v. *Boston Elevated Railway*, 207 Mass. 553. We have a person ignorant of actual danger, relying to some extent on memory of customary conditions, and presumably influenced by the now common knowledge of the public carrier's obligation to protect its patrons from harm, and of the probable performance of its duty. *Plummer* v. *Boston Elevated Railway, supra.*

The accident took place while the defendant was making extensive changes in its tracks, platforms, buildings and structures preparatory to using the Washington Street tunnel. Before September 9, 1908, at the North Station there was no curve in the edge of the station platform, and the distance between the platform and the cars was normally three inches, with a possible oscillation of from one to two inches either way, which might increase the space to five inches or reduce it to one inch. In order to enable the structure to be built and at the same time to accommodate travel during the interval between the discontinuance of the old structure and the completion of the new one, the defendant laid a temporary south bound track with a southern curve and built the adjacent platform. This temporary structure was completed so that trains began to run over it on October 8, 1908, and it continued in use until November 30, 1908. It followed the lines of the track and was constructed in the form of a curve and a reverse curve approximately the same degree in circumference. The space between the platform of the cars and the station platform varied, and the distance between the rear door entrance of the first car of a five car train such as the plaintiff attempted to board and the platform was about twelve and one half inches at the narrowest point, and a scant fourteen inches at the widest point, provided the first car stopped at the exact place indicated for it. There was expert testimony that the temporary platform, having reference to its use in connection with the rear platform of the first car of a

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five car train, in the ordinary and usual way and without any special protection was not a reasonably proper construction; and a number of methods of reducing what might be found to be a dangerous distance between the rear door platform of the first car of a five car train and the station platform were indicated, which methods the jury reasonably might find to be practical, efficient and not prohibitively expensive.

It is clear that there was evidence of the plaintiff's due care and of the defendant's negligence. This case is like *Brisbin* v. *Boston Elevated Railway*, 207 Mass. 553, and should have been submitted to the jury.

Exceptions sustained.

ISRAEL BRILLIANT *vs.* GEORGE SAMELAS.

Suffolk. March 24, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Broker, Commission. *Agency*.

Where a broker is employed by the owner of certain real estate to procure a customer either to buy the property or to exchange other property therefor, and he finds a customer who enters into an agreement for an exchange of property with the owner and who is able, ready and willing to carry out the agreement, the broker has earned his commission by procuring the customer, although the landowner that employed him refuses to make the exchange.

CARROLL, J. This is a bill in equity to reach and apply to the satisfaction of the plaintiff's claim, the defendant's interest in a certain mortgage. R. L. c. 159, § 3, cl. 7. The defendant placed his property in the hands of the plaintiff for the purpose of sale or exchange, and agreed to pay the plaintiff a commission if he procured a customer to whom the defendant could sell or exchange his property. One Merkelson owned property in Revere, and the plaintiff brought the defendant and Merkelson together. At an interview in March, 1914, all the terms of the agreement for the exchange of the Revere property and the property of the defendant in East Boston were completed, except the placing of a loan

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upon the property in Revere, the plaintiff and his witness contending that the loan was to be for the sum of $14,000 for five years, and the defendant contending it was to be $15,000 for five years. Merkelson did secure a mortgage for $14,000 for five years and the defendant was notified of this fact but refused to make the exchange on the terms agreed to, and later sold the property to one Rebecca Cohen, taking from her a mortgage, the interest of the defendant in which the plaintiff seeks to reach and apply by this bill in equity.

The judge of the Superior Court * found that the plaintiff had earned his commission and a decree has been entered in his favor. On an appeal from such a decree, where the witnesses were seen and heard by the judge sitting in equity, his decision will not be disturbed unless it is clearly wrong. *Dickinson* v. *Todd*, 172 Mass. 183. *S. K. Edwards Hall Co.* v. *Dresser*, 168 Mass. 136.

It was undisputed that the plaintiff was hired to procure a customer, either to buy the property of the defendant or to exchange other property therefor. It was practically admitted that Merkelson, through the efforts of the plaintiff, entered into an agreement with the defendant. The question of the amount of the mortgage, the finality of the agreement of the parties and all the facts in the case were questions for the judge to decide, and his findings ought not to be reversed. There was ample evidence that the plaintiff found a customer who was able, ready and willing to make the exchange, and that was what he was employed to do.

We are unable to distinguish the case at bar from the case of *Fitzpatrick* v. *Gilson*, 176 Mass. 477, where the principle is clearly stated in this language: "When a broker has found a customer for that for which his principal has employed him to find a customer, the broker has performed his duty and has earned his commission, or, as the proposition is usually stated, if the person produced by the broker is able, ready, and willing to buy, sell, or lend, as the case may be, the broker's commission is earned." See also *Munroe* v. *Taylor*, 191 Mass. 483; *Taylor* v. *Schofield*, 191 Mass. 1; *Boardman* v. *Hanks*, 185 Mass. 555.

The rule established in *Fitzpatrick* v. *Gilson* is not disturbed by anything decided in *Quinn* v. *Burton*, 188 Mass. 466, where the

* *Jenney*, J.

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supposed customer never agreed to make an exchange, or in *Clark* v. *Bonner*, 217 Mass. 201, where it was a question of fact whether the purchaser was ready to exchange or the parties ever agreed on any terms.

It was not necessary for the plaintiff to take part in making the final contract of exchange. *Willard* v. *Wright*, 203 Mass. 406.

Decree affirmed.

S. Carver, for the defendant.

J. H. Blanchard, (*H. C. Blanchard* with him,) for the plaintiff.

LILLIAN A. AMES *vs.* NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

Suffolk. March 26, 1915. — May 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Evidence, Declarations of deceased persons. *Railroad*. *Practice, Civil*, Exceptions.

Where a judge presiding at a trial found that certain declarations of a deceased person, offered in evidence under R. L. c. 175, § 66, were made of the declarant's own knowledge, and admitted the declarations in evidence, and where the evidence did not warrant such a finding, the ruling admitting the evidence is subject to an exception, and an exception thereto must be sustained.

At the trial of an action of tort against a railroad company for damages resulting from a fire caused by sparks communicated by a locomotive engine of the defendant, the plaintiff offered in evidence the deposition of the widow of an assistant station agent of the defendant, who at the time of the fire had been employed at a station in plain view of the property destroyed and four hundred and ninety feet from it, in which the witness stated that her husband had died and that she had heard him state a few days after the fire that sparks from a locomotive of the defendant had caused the fire. The record contained no evidence that at the time of the fire or immediately preceding it the witness's husband was at the station or at any place from which he could see at the same moment both the locomotive and the buildings which burned, nor was there any evidence that he saw sparks fly from the locomotive to the buildings and that, following such flight, he saw fire in, upon or near the buildings. The judge found that the declaration was made in good faith and of the declarant's own knowledge and admitted the evidence. *Held*, that an exception to the admission of the evidence must be sustained, because there was no evidence warranting the judge's finding that the declaration was made by the deceased person of his own knowledge.

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TORT for damages caused by fire communicated by sparks from a locomotive engine of the defendant. Writ dated June 21, 1902.

In the Superior Court the case was tried before *Hitchcock*, J. The material facts are stated in the opinion. There was a verdict for the plaintiff in the sum of $1,100; and the defendant alleged exceptions.

Joseph Wentworth, for the defendant.

E. N. Hill & F. G. Bauer, for the plaintiff.

PIERCE, J. To establish the proposition that her buildings were destroyed by fire communicated by the locomotive engines of the defendant, the plaintiff offered in evidence the deposition of Mrs. Eugenia M. Moore (who was deceased at the time of the trial) wherein she testified that shortly after the fire and before the commencement of this action her husband who afterwards had died made certain declarations relative to its origin. These declarations were made on the Sunday following the fire, to the plaintiff and her husband, at the house of the declarant.

The deponent testified: "He said sparks from the engine, or locomotive, whatever you call it, had set the carriage house on fire, but he would not like to be called as a witness because he was in the employ of the railroad and he would not care to lose his job." Moore was then in the employ of the defendant as an assistant station agent, at the Spring Street station, which was located on the line of the railroad, was in plain view of the property destroyed, and distant four hundred and ninety feet therefrom. There is no testimony in the deposition, or otherwise reported, which states how the subject matter of the origin of the fire was introduced, although it reasonably may be inferred that the owner came in search of information and that the declaration was made in answer to questions.

There is no evidence that at the time of the fire or immediately preceding it Moore was at the station or at any place from which he could see at the same moment both locomotives and buildings. There was no evidence that he in fact saw sparks fly from a locomotive to the buildings and that following such flight he saw fire in, upon or near to the buildings.

The defendant seasonably excepted to the reading of the deposition, and especially to the declaration of Moore on the ground that it does not sufficiently appear that it was of his personal

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knowledge. The plaintiff argues that as the judge has found that the declaration was made in good faith and of the man's own knowledge, this is the sole test of admissibility under R. L. c. 175, § 66, and no exception lies to his ruling. "But we are of opinion that the admission or rejection of evidence does not rest in the mere discretion of the judge who tries the case, but upon rules and principles of law, framed and adapted to promote justice between parties in difference; and that where a judge errs in the admission of testimony not admissible by the rules of law, or rejects testimony which ought to have been admitted, such error is ground of exception, though he himself, and not the jury, may be called upon in the first instance to weigh the evidence. The judge is to consider the preliminary evidence, and he is of course to decide whether it is credible or not; and his decision as to its credibility, like that of a jury, is conclusive. But in his decision as to its admission, he must be governed by the rules of law." *Foster* v. *Mackay*, 7 Met. 531, 537. "His decision is conclusive, unless he saves the question for revision by the full court, on a report of the evidence, or counsel bring up the question in a bill of exceptions which contains a statement of the evidence." *Gorton* v. *Hadsell*, 9 Cush. 508, 511. *Commonwealth* v. *Robinson*, 146 Mass. 571. *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318, 320.

All the evidence before the judge upon which he made his decision was contained in the deposition and is before us. It is clear that it does not establish that Moore made the declaration upon his personal knowledge. It was therefore inadmissible.

Exceptions sustained.

JOSEPH MORRIS *vs.* EASTERN STEAMSHIP CORPORATION.

Suffolk. March 2, 1915. — May 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability.

In an action by a longshoreman against a steamship company by which he was employed for personal injuries from a box, which was alleged to have been piled on other boxes negligently by servants of the defendant, falling on the plain-

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tiff when he was wheeling a truck in unloading a vessel at the defendant's wharf, where the accident happened after the workmen's compensation act had taken effect and the defendant was not a subscriber under the provisions of that statute, but there was nothing to show what caused the box to fall on the plaintiff, it was *held*, that there was no evidence that the fall of the box was caused by the negligence of the defendant or of its servants and that a verdict properly was ordered for the defendant.

TORT for personal injuries sustained on July 28, 1913, when the plaintiff was employed by the defendant as a longshoreman and was wheeling a truck in unloading a steamer at the defendant's wharf extending from Atlantic Avenue in Boston, by reason of a box falling on the plaintiff, its fall being alleged to have been due to negligence of the defendant and its agents and servants in handling and piling boxes. Writ dated December 6, 1913.

The case was tried before *Brown*, J. It appeared that the defendant was not insured under the provisions of the workmen's compensation act. In regard to the happening of the accident the plaintiff testified: "Before I get hurt I go with my truck and going to take a load to the boat and then I went on the stage . . . and two fellows piling boxes on the dock and I started to go down the boat on the stage and the plank go down to the water and two fellows piling the boxes and the box turn over and striked me in the head and face and back." Being asked, "Do you know how high that pile of boxes was?" He answered, "Well, I cannot tell how high but a guess, — it is a big box, it is higher than my head. I cannot tell, but such like that I guess. I cannot tell you how high. . . . Big boxes. . . . It is more big, about three feet high and four or five feet long. I don't measure them. . . . Yes, I see the men piling them, but I don't know their name." There was nothing to show what caused the box to fall on the plaintiff. At the close of the plaintiff's testimony the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

P. J. Donaghue, (*F. W. McGowan* with him,) for the plaintiff.

C. C. Barton, Jr., for the defendant.

BRALEY, J. The verdict for the defendant was ordered rightly, even if the defences of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow employee were not available under St. 1911, c. 751, Part I, § 1, because the company was not a subscriber.

The plaintiff failed to introduce any affirmative evidence from

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which the jury would have been warranted in finding that the fall of the box resulted from either the defendant's negligence, or the negligence of its servants. *Hofnauer* v. *R. H. White Co.* 186 Mass. 47. *Droney* v. *Doherty*, 186 Mass. 205, 206. *Curtin* v. *Boston Elevated Railway*, 194 Mass. 260. *Ryan* v. *Fall River Iron Works Co.* 200 Mass. 188.

Exceptions overruled.

HARRY J. HOMRICH *vs.* LAWRENCE ROBINSON (afterwards DORA H. ROBINSON, administratrix) & others.

Suffolk. March 2, 3, 1915. — May 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Decree *pro confesso*. *Equity Jurisdiction*, To recover stolen property in hands of police department. *Police*.

In a suit in equity to recover certain property of the plaintiff stolen from him by two of the defendants which was alleged to be in the custody of the other defendants, who were officers of the police department of a city and on arresting the first two defendants for another crime had found the plaintiff's property in their possession, if such other defendants, instead of demurring, pleading or answering to the bill, file what they call a stipulation, stating that the property is in their possession as officials of the police department and that they stipulate and agree to retain it in their possession until further order of the court, it *seems*, that the bill should be taken *pro confesso* against these defendants and a decree entered accordingly, although the stipulation, if it can be considered a part of the record, may make the issuing of an injunction against these defendants unnecessary.

A suit in equity may be maintained to recover property stolen from the plaintiff which is in the custody of the police department of a city after having been taken from the thief when he was arrested for another crime and where the officers having custody of the property have refused to expose it so that it can be taken in replevin.

Where in such a case the court has jurisdiction to compel the restoration of specific property stolen from the plaintiff this jurisdiction will be retained to cover also money found in the possession of the thief when he was arrested which he had derived wholly from the sale of other property that he stole from the plaintiff at the same time.

BILL IN EQUITY, filed in the Superior Court on July 17 and amended on October 27, 1914, alleging that the plaintiff was a

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jeweller having his place of business in Huntington in the State of West Virginia and that Lawrence Robinson (one of the original defendants since deceased) and the defendant Duddy there stole fifteen thousand dollars' worth of jewelry from the plaintiff, that they afterwards were arrested in Boston where they were held to await trial as violators of the laws of this Commonwealth, that when they were arrested they had in their possession seven diamonds described in the bill which were stolen by them from the plaintiff and certain money, consisting of $471 in the possession of the defendant Duddy and $390 in the possession of the defendant Lawrence Robinson, all of which was derived from the sale of other property stolen from the plaintiff that could not be found, and that the diamonds and money were legally in the custody of all or some of the defendants O'Meara, McGarr, Armstrong and the city of Boston.

Paragraph six of the bill, referred to in the opinion, was as follows: "6. That said property is legally in the custody of all or some of the other defendants named herein and cannot rightfully be come at in the ordinary action of replevin or attached by the ordinary legal process, and there is no full, adequate or complete remedy provided for by law for reaching said property and applying or delivering the same for the plaintiff's benefit."

The prayers of the bill were that the defendants Robinson and Duddy might be enjoined from assigning or attempting to convey any interest in the property, that the other defendants also might be enjoined from disposing of the property without further order of the court; and that they might be declared to hold the property as trustees for the benefit of the plaintiff subject to the order of the court; that the plaintiff's title to the seven diamonds described in the bill might be established and that those of the defendants having the diamonds in their present custody might be ordered to deliver them to the plaintiff under such conditions as the court might order; and for further relief.

On July 20, 1914, the defendants O'Meara, McGarr, Armstrong and the city of Boston filed a paper entitled a "stipulation," representing "that the property named in the plaintiff's bill of complaint, if now in their possession or that of either of said respondents, is held by them in their capacities as officials of the Boston police department, and they stipulate and agree that

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the same shall be retained in their possession until the further order of this [the Superior] court."

A suggestion of the death of the defendant Lawrence Robinson on July 22, 1914, was filed, and on September 29, 1914, upon the petition of Dora Hard Robinson, the administratrix of the estate of Lawrence Robinson, she was admitted as a party to appear and defend the suit as such administratrix.

A suggestion having been filed that the defendant Duddy was a minor, Harry W. James, Esquire, was appointed guardian *ad litem* to represent him.

The defendants Robinson and Duddy filed pleas to the jurisdiction, which were waived by them at the argument before this court, as stated in the opinion. Those defendants also demurred to the bills, alleging among other causes for demurrer that the plaintiff had a plain, adequate and complete remedy at law.

The case came on to be heard upon the demurrers of the defendants Robinson and Duddy before *Fessenden*, J., who at the request of the parties reserved the case for determination by this court. If the demurrers were sustained the bill was to be dismissed; otherwise, such order was to be made as justice and equity might require.

J. P. Leahy, for the plaintiff.

J. H. Blanchard, (*H. C. Blanchard* with him,) for the defendant Dora H. Robinson.

S. R. Cutler, for the guardian *ad litem* of the defendant Duddy.

BRALEY, J. The pleas to the jurisdiction having been waived at the argument, the question is whether the bill states a case for equitable relief.

It is apparent from the essential allegations, that the plaintiff's property, consisting of rings with diamond settings, was feloniously appropriated at his place of business in another State by the defendant Robinson's intestate and the defendant Duddy, who after the theft were apprehended and held in custody in this Commonwealth, when the diamonds which they had removed from the rings were found among their effects, as well as moneys alleged to have been derived from the sale of other property of the plaintiff not described but stolen at the same time.

The bill further alleges that the diamonds and funds are in

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the custody of some of the remaining defendants, but under what process of law or by what authority does not appear.

If we assume on the record that they did not choose to demur, plead or answer, the proper course would have been to order that the bill be taken for confessed as to them and to enter a decree accordingly. The stipulation, if we assume it to be a part of the record, while it may have rendered the issuance of an injunction unnecessary, could not supply the place of proper pleadings and procedure.

If, however, it is assumed under paragraph six, that these defendants have the bare possession and that nothing remains to be done except to deliver the property to the rightful owner, the defendants Robinson and Duddy severally contend that the remedy at law is plain, complete and adequate.

The plaintiff, who never has parted with the title, is under no obligation to sue for conversion. He is entitled to a return of the diamonds, which need not be delayed by reason of the pendency of criminal proceedings instituted for the violation of our laws but which are wholly independent of the larceny. If equity has jurisdiction of the suit to recover the diamonds, the bill can be retained to determine the plaintiff's rights in the moneys which the demurrants admit are the proceeds of sales of the stolen property of which the diamonds formed only a part. *American Stay Co.* v. *Delaney*, 211 Mass. 229. *Perry* v. *Pye*, 215 Mass. 403. It is true that this paragraph is extremely meagre, but we cannot say it is wholly insufficient. It is averred, that the property "cannot rightfully be come at in the ordinary action of replevin or attachment by the ordinary legal process, and there is no full, adequate or complete remedy provided by law for reaching said property and applying or delivering the same for the plaintiff's benefit." The demurrers admit the truth of these averments which by legal intendment mean that the defendants who have the custody refuse, or by their silence decline, to expose the diamonds so that they can be taken in replevin. The jurisdiction in equity of course need not be exclusive. It may be concurrent even where money damages are recoverable or replevin will lie. *Wilkinson* v. *Stitt*, 175 Mass. 581. *Stratton* v. *Hernon*, 154 Mass. 310, 312. The plaintiff, to preserve his rights until the question of ownership can be determined and his right to full restitution if he pre-

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vails, must have injunctive relief which a court of common law cannot give. It is settled that where this situation appears the remedy at law is not deemed adequate. R. L. c. 159, § 3, cl. 1. *Hodgkins* v. *Bowser*, 195 Mass. 141. *Holmes* v. *Woodworth*, 6 Gray, 324.

It is next urged, that the property being in custody of the law it cannot be reached by creditors of the debtors. *Travelers Ins. Co.* v. *Maguire*, 218 Mass. 360, 362, 363. But this is not a bill to reach and apply property of the demurrants in payment of any debt or demand due from them to the plaintiff. The relation of debtor and creditor does not exist. It would be extraordinary indeed if after larcenous asportation the guilty parties could bar the owner from establishing his title on the bare assertion that, the property having been found in their possession, it thereafter remained in custody of the law and he must go out of court empty-handed.

The demurrers should be overruled.

Decree accordingly.

THEODORE P. LANCASTER *vs.* ABRAHAM STANETSKY & trustee.

Suffolk. March 4, 1915. — May 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Findings of trial judge.

A judge before whom a case is tried without a jury has a right to disregard the evidence of one of the parties and to believe the testimony to the contrary on the other side, and his doing this is not an error of law.

TORT for the alleged conversion of a machine called a "racing machine" of the alleged value of $650. Writ in the Municipal Court of the City of Boston dated February 17, 1913.

On removal to the Superior Court the case was tried before *Ratigan*, J., without a jury. The plaintiff testified "that the purpose of the machine was to reproduce a motor bicycle race upon the stage."

There was evidence for the plaintiff that for about two years

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previous to October, 1912, the machine was stored on the premises of the Symonds and Poor Carbonator Company on Washington Street in Boston; that the International Trust Company held a mortgage on the property of the carbonator company, which it foreclosed by an auction sale of all the property of that company on October 7, 1912, to one O'Brien; that on October 8, 1912, O'Brien sold the property he had purchased to the defendant, who thereupon called at the premises and obtained the keys; that the plaintiff then told the defendant of his machine, how it was packed and marked and the place on the premises where it was stored; that the defendant assured the plaintiff that the machine would be all right there for the rest of the month; that there was other property on the premises belonging to third persons and, like the plaintiff's machine, not included in the mortgage; that on October 22, 1912, the defendant sold at auction parts of the plaintiff's machine together with parts of the property that the defendant had purchased from O'Brien; that on that same day before the sale the defendant had been told that the machine belonged to the plaintiff and that the defendant had no right to sell it; but that he sold parts of it as above stated and took another portion of it to his own store; and that on the following day all the parts of the plaintiff's machine had disappeared.

The defendant testified that he had nothing to do with closing up the place; that when he left, after the auction, there were about thirty or forty barrels of rubbish there, and that he had nothing to do with the moving of it; that he never moved any machine or sold any machine like the racing machine or any parts of it; and that he never received anything from the plaintiff for taking care of any machine. He also contradicted other portions of the plaintiff's evidence.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That on all the evidence there has not been shown a tortious taking of the racing machine by the defendant.

"2. That on all the evidence no demand for and refusal to deliver up the racing machine had been shown.

"3. That there is no evidence to show that the defendant ever had possession of the racing machine or that the defendant ever had it in his power to deliver the racing machine.

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"4. That on all the evidence the plaintiff is not entitled to maintain this action."

The judge refused to make any of these rulings and found for the plaintiff in the sum of $674.12. The defendant alleged exceptions.

W. A. Buie, (*A. M. Burroughs* with him,) for the defendant.

G. A. Sanders, for the plaintiff.

BRALEY, J. The judge before whom the case was tried without a jury having found for the plaintiff, the only questions are whether the evidence as matter of law warranted the finding, and if so, whether any of the defendant's requests for rulings should have been given. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89.

The exceptions purport to recite at length all the material evidence. It is conflicting. But the credibility of the witnesses and the weight to be given to their testimony were for the presiding judge. A detailed recapitulation is unnecessary. It is sufficient to say that if the evidence introduced by the plaintiff was believed, the racing machine had been stored on the premises of the carbonator company where it remained at the time of the foreclosure of the mortgage. It is of course plain, that, the purchaser at the sale having acquired no title to the machine, the defendant, who subsequently bought from the purchaser, acquired none. And, if the defendant although acting in good faith thereafter exercised dominion over the plaintiff's property, no demand was necessary before bringing an action for conversion. *Gilmore* v. *Newton,* 9 Allen, 171. *Greenall* v. *Hersum,* 220 Mass. 278. The judge could find, that when the defendant took possession of the premises he knew that the machine belonged to the plaintiff, by whom he was notified how it was packed and marked as well as of the place where it was stored. Its subsequent sale either in whole or in part by the defendant, when he disposed by auction of the goods and chattels purchased, was a conversion. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway,* 187 Mass. 500, 506.

It is true, as the defendant contends, that to reach this conclusion the judge must have disregarded the defendant's evidence, but this is not an error of law.

The requests therefore properly were refused and the exceptions must be overruled.

So ordered.

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THOMAS E. JONES *vs.* ALEXANDER MAGUIRE & another, executors.

Middlesex. March 4, 1915. — May 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Conservator. Waiver. Election. Guardian. Husband and Wife.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, is a personal privilege and not a property right, and therefore before the enactment of St. 1915, c. 23, could not be exercised by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power.

APPEAL from a decree of the Probate Court for the county of Middlesex dismissing a petition by Thomas E. Jones as the sole heir of Edward Jones, of Newton, the surviving husband of Margaret Jones. The will of Margaret Jones was admitted to probate on November 11, 1910. The petition represented that by virtue of the waiver of the provisions of the will of Margaret by her surviving husband Edward, which was filed by the conservator of the property of Edward who then was insane, the petitioner was entitled to take the statutory share of Edward in the estate of Margaret.

The alleged waiver was as follows: "Respectfully represents Edward Jones of Newton in the County of Middlesex that he is the husband of Margaret Jones, late of Newton in the County of Middlesex, deceased, that the will of said deceased was admitted to probate in said County by decree of this court dated November 11, 1910, and he doth hereby waive any provisions that may have been made in it for him and doth claim such portion of the estate of the deceased as he would have taken if the deceased had died intestate. Dated this third day of December, 1910. Edward Jones, by Thomas E. Jones, conservator."

The appeal was heard by *Braley*, J., who made findings of fact and at the request of the parties reported the case on such findings for determination by the full court.

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St. 1915, c. 23, which is referred to in the opinion but has no application to this case, is entitled "An Act relative to the duties and powers of conservators," and is as follows:

"Section 1. Conservators appointed under the provisions of section forty of chapter one hundred and forty-five of the Revised Laws and acts in amendment thereof or in addition thereto shall have the powers, and perform the duties, except as to the custody of the person, of guardians of insane persons. All provisions of law relating to the jurisdiction of the Probate Court over the estates of persons under guardianship as insane persons shall be applicable to the estates of persons under conservatorship.

"Section 2. This act shall take effect upon its passage."

W. A. Buie, (*P. S. Cunniff* with him,) for the petitioner.

W. A. Murray, for the respondents.

BRALEY, J. By the R. L. c. 145, § 33, "If property, rights or benefits given by will or by provision of law depend upon the election, waiver or other act of a person incompetent by reason of insanity or minority to exercise or perform the same, his guardian may make such election or waiver or perform such acts."

But the petitioner, who had been appointed only as a conservator, was not clothed with this authority when the right of his insane ward to elect under R. L. c. 135, § 16, whether he would accept or waive the provisions made for him in the will of his deceased wife, accrued. R. L. c. 145, § 40, as amended by Sts. 1903, c. 96; 1905, c. 127; 1907, c. 169, § 3. *Chase* v. *Chase*, 216 Mass. 394. See St. 1915, c. 23.

While charged with the entire management of his ward's estate, the right of election or waiver is not a property right. It is purely a personal privilege, the exercise of which rested in the discretion of the surviving spouse, although by reason of insanity he was legally incapable of the power of choice. *Sherman* v. *Newton*, 6 Gray, 307. *Pinkerton* v. *Sargent*, 102 Mass. 568, 570. *Kent* v. *Morrison*, 153 Mass. 137, 140.

The decree of the court of probate dismissing the petition should be affirmed.

Ordered accordingly.

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MARSHALL S. P. POLLARD *vs.* JOHN F. KETTERER.

Suffolk. March 5, 1915. — May 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Deed. Writ of Entry. Pleading, Civil, Equitable defence. *Equity Jurisdiction,* To reform deed. *Land Court. Evidence,* Presumptions and burden of proof, Report of judge of Land Court.

Where the owner of two adjoining lots of land on a street of a city, each lot having a building thereon and the two buildings being divided by a partition wall, by deeds of even date conveyed each of the lots to a different grantee describing the granted premises clearly by metes and bounds, and by these descriptions the dividing line instead of running through the centre of the partition wall added a strip of land to one of the lots which it took from the other, so that the grantee of the diminished lot substantially lost the entrance to his building from a public street on one side and was deprived of the support of the partition wall and of four feet of the front bedrooms on an upper floor, the descriptions are not ambiguous, and the mistake, if there was a mistake, cannot be corrected in defence to a writ of entry brought by the grantee of the added strip of land to assert his title; unless under R. L. c. 173, § 28, the grantee of the diminished lot can be allowed to set up a mutual mistake of fact as an equitable defence, a question which was not raised in this case.

In the case above stated, it was *said*, that another question that was not raised was whether the tenant could obtain relief in a suit in equity to reform the deeds.

Where a description of land in a deed, after defining the land clearly by metes and bounds, concludes with the phrases "or however otherwise bounded, measured or described" and "be all said above measurements more or less," if no reference is made in the deed to any previous conveyance or source of title, these words are not equivalent to a general description and give the grantee no right to any land outside the parcel included in the particular description.

The provision of St. 1905, c. 288, that, on an appeal from the Land Court to the Superior Court for a jury trial on the facts, the judge of the Land Court shall file "a full report of his decision and of the facts found by him so far as they relate to or bear upon any question involved in the appeal, and upon the trial of the cause in the Superior Court such report shall be *prima facie* evidence as to the matters therein contained," so far as it relates to the effect of the report is a rule of evidence, and findings contained in such a report, which are based on extrinsic evidence that should not have been admitted to affect the construction of a clear description in a deed, have no probative force.

WRIT OF ENTRY, dated April 24 and amended December 13, 1909, by the owner of the Hotel Haymarket on the corner of Causeway Street and Canal Street in Boston against the owner of

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Ketterer's Hotel adjoining the demandant's hotel on Canal Street, to recover a strip of land at the rear of the demandant's hotel measuring two and ten one hundredths feet on that street and running back at that uniform width the distance of forty-eight and fifty one hundredths feet.

In the Land Court the case was tried before *Davis*, J., who on April 8, 1910, filed a decision in favor of the tenant. From this decision the demandant appealed to the Superior Court under St. 1904, c. 448, § 8, and St. 1905, c. 288, "for a jury trial on the facts on the ground that the court was in error in deciding that the demanded premises were conveyed by the deed of A. W. Pollard to Alexander H. Wood and Marshall S. P. Pollard, dated September 1, 1897, and recorded with Suffolk Deeds, Book 2468, page 412, and by said Wood and Pollard to the tenant by deed dated September 1, 1897, recorded with Suffolk Deeds, Book 2469, page 390."

The following issue was framed by the judge of the Land Court to be tried by a jury as an issue of fact before the Superior Court: "What is the boundary between the estate conveyed by A. W. Pollard to Alexander H. Wood and Marshall S. P. Pollard, by deed dated September 1, 1897, recorded with Suffolk Deeds, Book 2468, page 412, and by Alexander H. Wood and M. S. P. Pollard to John F. Ketterer by deed dated September 1, 1897, and recorded with Suffolk Deeds, Book 2469, page 390, and the estate conveyed by A. W. Pollard to Frederick H. Pollard by deed dated September 1, 1897, recorded with Suffolk Deeds, Book 2468, page 409, and by Frederick H. Pollard to Alexander H. Wood, M. S. P. Pollard and A. W. Pollard by deed dated September 1, 1897, recorded with Suffolk Deeds, Book 2468, page 411."

The judge of the Land Court filed a report of his decision under St. 1905, c. 288.

In the Superior Court the issue was tried before *Bell*, J. Upon the motion of the demandant the issue was amended by changing the first word so as to read "Where is the boundary" instead of "What is the boundary."

At the close of the demandant's opening, the counsel for the tenant stated that the tenant's contention was that the boundary line ran through the centre of the partition wall. The judge

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ruled that the evidence offered by the tenant, which is described in the opinion, consisted of matters outside the deeds and must be excluded except the report of the judge of the Land Court, which he admitted.

The tenant made a motion that the demandant's appeal be dismissed. This motion was denied by the judge, and the tenant excepted.

The judge refused to order a verdict for the tenant. He made the following rulings:

"1. I rule that the deeds themselves disclose no ambiguity which opens the door to parol evidence to aid in their construction.

"2. I rule that the facts stated in the offer of evidence by the tenant if admitted would not raise any ambiguity as to the meaning of the deeds, and that the evidence as offered is not admissible, except the report of the Land Court which I admit.

"3. I rule that at the trial before me, I must admit or exclude evidence, as it under the circumstances appears to me competent or incompetent, whatever may have been the ruling on that point of another judge at another trial, giving all due respect to the views of such judge.

"4. Such parts of the report of the judge of the Land Court as are inconsistent with my ruling, I direct the jury to disregard."

The judge further instructed the jury as follows:

"In making these rulings, I am of the opinion that the deeds speak for themselves, and that they require that the jury should return a verdict in these terms, which I, accordingly, direct them to do:

"The jury find that the line in question between the parties begins at the west corner of the Ketterer lot at land now or late of J. D. Small and land of Durkee, thence it runs northeasterly bounding on said Small's land, to the northeast corner of land of said Small, thence continuing northeast in a straight line on the same course to the southwest line of Canal Street at a point 29.33 feet northwest from the centre of the Butler party wall."

The judge added by way of explanation the following: "The facts offered to be proved by the tenant raise some presumption — and the presumption that the deeds do not correctly represent the true intentions of the parties. That, however, is not a matter

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which can be settled in this court, and in my judgment can only be determined by a proceeding in equity to reform the deeds. Whether that proceeding would be successful or not, I indicate no opinion. If the parties make a mistake in their deeds, a mutual mistake in their deeds, that is the way in which it can be reformed, the deed can be reformed; and until reformed, a deed properly made is binding upon both parties."

The jury returned the finding directed by the judge; and the tenant alleged exceptions.

St. 1905, c. 288, is as follows: "Appeals from the Land Court to the Superior Court shall be appeals for a jury trial on the facts. When an appeal is taken from the Land Court to the Superior Court, the judge of the Land Court who rendered the decision or made or signed the order or decree appealed from shall, within thirty days after the entry of the appeal in the Superior Court, file in said Superior Court a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal, and upon the trial of the cause in the Superior Court such report shall be *prima facie* evidence as to the matters therein contained."

W. B. Sullivan, (*P. O'Loughlin* with him,) for the tenant.

A. Marshall, for the demandant.

BRALEY, J. We are of opinion that the tenant's exceptions should be overruled.

The parties who derive title from a common grantor own contiguous estates, and having fallen into a controversy over the dividing line, this action is brought to determine the ownership of the strip in dispute.

The exclusive jurisdiction of writs of entry brought under R. L. c. 179, was conferred upon the Land Court by the St. of 1904, c. 448, which provided in § 8, that any decision whereby any party is aggrieved shall be subject to an appeal to the Superior Court for the county in which the land lies for a jury trial upon the facts. But the issues are to be framed in the Land Court, after the appeal is claimed. *Foss* v. *Atkins*, 193 Mass. 486.

The demandant seasonably perfected his appeal, and with the exception that the report of the judge of the Land Court who found for the tenant was admissible in evidence, the issue trans-

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mitted was to be tried as if the action had been begun in the appellate court, which properly allowed the amendment making the issue more definite in form, but not changing it in substance. *Luce* v. *Parsons*, 192 Mass. 8, 12. *Cohasset* v. *Moors*, 204 Mass. 173. *Weeks* v. *Brooks*, 205 Mass. 458, 461. *Old Colony Street Railway* v. *Thomas*, 205 Mass. 529. *Bigelow Carpet Co.* v. *Wiggin*, 209 Mass. 542. *Blake* v. *Rogers*, 210 Mass. 588. St. 1905, c. 288. See St. 1910, c. 560.

If the northwesterly boundary of the premises demanded is determined, the northeasterly boundary of the tenant's land will be ascertained, and, no question of title by prescription having been raised, resort must be had to the documentary evidence with the burden of proof resting on the demandant. *Bishop* v. *Burke*, 207 Mass. 133.

The parcels with the respective buildings or hotels formerly comprised one estate, which the owner divided by deeds of even date, wherein each tract is described as bounded by the other tract. The buildings covering very nearly the whole area had a common partition or party wall, the centre of which before the merger in ownership of the grantor was the division line, but the deeds to the demandant and the tenant divided the land so that the description in the demandant's deed covers a portion of the tenant's building, shutting off substantially the entrance from the public street on the northwesterly side, as well as depriving the tenant of the support of the common wall, and of four feet of the front bedrooms on the upper floor. It is his contention that these conditions make the descriptions ambiguous, and he furnished evidence from which the jury would be warranted in finding that the grantor intended that the true boundary line should be coincident with the centre of the common wall.

But, if evidence of this character is admissible where the language used in the deed is of doubtful meaning or where a boundary is named of a natural object, the location of which must depend on the observation and recollection of witnesses, it is inadmissible where the wording of the instrument is unambiguous and all the calls can be satisfied. *Stone* v. *Clark*, 1 Met. 378, 381. *Temple* v. *Benson*, 213 Mass. 128. *Morrison* v. *Holder*, 214 Mass. 366, 369.

The descriptions are by metes and bounds, and the record shows

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that upon application to the land the measurements give to each grantee the parcel described and conveyed. If the words "or however otherwise bounded, measured or described" and "be all said above measurements more or less" are common to each instrument, they are not the equivalent of a general description, for no reference is made to other conveyances or sources of title. *Foss* v. *Crisp*, 20 Pick. 121. *Hopkins* v. *Smith*, 111 Mass. 176. *Olson* v. *Keith*, 162 Mass. 485. But, even if susceptible of such effect, the tenant is not helped, as they would not exclude from the operation of the demandant's deed the parcel included in the particular description. *Whiting* v. *Dewey*, 15 Pick. 428. *Eldred* v. *Davis*, 181 Mass. 498. *Hamlin* v. *Attorney General*, 195 Mass. 309. The construction of the deeds adopted by the presiding judge, and his rulings that parol evidence was inadmissible to vary the terms of the grants, as well as the ruling that he was not bound by the report of the judge of the Land Court in so far as it was inconsistent with his own view of the law, were correct.

The situation appears to be one of much hardship, but whether the tenant could have relief in equity by an original bill or an answer by way of equitable defence, which has not been pleaded, is not before us. *Holbrook* v. *Schofield*, 211 Mass. 234. R. L. c. 173, § 28.

The denial of the tenant's motion, to dismiss the appeal after the rulings had been announced because no question of fact remained for the jury, was right. It is true that, the report being in the tenant's favor, unless there was evidence to the contrary he was entitled to a verdict. *Bishop* v. *Burke*, 207 Mass. 133, 139. The statute, however, requiring the report deals only with a rule of evidence, and rulings of law found in the report may be rectified or reversed. *Woodvine* v. *Dean*, 194 Mass. 40, 42, 43. *Fisher* v. *Doe*, 204 Mass. 34, 39, 40. The true construction of the deeds was a question of law and not of fact. *Eddy* v. *Chace*, 140 Mass. 471. *Lipsky* v. *Heller*, 199 Mass. 310. And if under the rulings the facts no longer were uncertain or indefinite, the trial nevertheless was with a jury upon the issue as framed. *Fay* v. *Alliance Ins. Co.* 16 Gray, 455, 461. *Carter* v. *Goff*, 141 Mass. 123. *Hillyer* v. *Dickinson*, 154 Mass. 502, 504.

The findings shown by the report were made upon extrinsic

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evidence which the appellate court correctly held to be inadmissible, and the probative force of the report under the statute accordingly disappeared. *Blake* v. *Rogers*, 210 Mass. 588, 594. The tenant having failed to introduce any relevant and competent testimony to control the evidence introduced by the demandant, the jury properly were directed to return the answer establishing the boundary in accordance with the demandant's title. *Hillyer* v. *Dickinson*, 154 Mass. 502, 504.

Exceptions overruled.

COMMONWEALTH *vs.* EDWARD FEENEY.

Suffolk. March 15, 1915. — May 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Shell Fish. Board of Health, State. *Commissioners on Fisheries and Game. Constitutional Law,* Police power.

The provisions of R. L. c. 91, §§ 113, 114, that the commissioners on fisheries and game shall prohibit the taking of oysters, clams, quahaugs and scallops from certain defined areas of tidal water and flats upon receipt of a request to that effect from the State board of health, such request being made after that board has determined upon investigation that such areas are contaminated by sewage or other causes, and that any person violating such prohibition shall be subject to a fine, although they give no right to be heard to persons interested in the action of the State board of health, are a valid exercise of the police power by the General Court.

The provision of § 113 above described, that the order of the commissioners on fisheries and game shall prohibit the taking of such shell fish from such contaminated waters or flats "for such period of time as the State board of health may prescribe," does not require that the State board of health in its request nor the commissioners in their order shall state when the prohibition shall cease, but means only that the prohibition shall remain in force until the State board of health becomes satisfied that the contamination has ceased.

COMPLAINT, received and sworn to in the East Boston District Court on September 8, 1914, charging the defendant under R. L. c. 91, §§ 113, 114, with taking clams from flats in the city of Boston from which the taking of clams was prohibited by the commissioners on fisheries and game at the request in writing of the State board of health.

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The case was tried before *Dana*, J., upon an agreed statement of facts, material portions of which are described in the opinion.

The defendant offered to prove that the flats from which he took clams were not contaminated, and that the clams so taken were clean and wholesome, and fit for food. The judge excluded the evidence subject to an exception by the defendant.

The defendant asked for the following rulings:

"1. That upon the foregoing facts the Commonwealth has failed to make out a case against the defendant, and that he is entitled to a verdict of not guilty.

"2. That no 'period of time' has been prescribed during which the taking of clams from the flats referred to is intended to be prohibited.

"3. That the acts of the State board of health and of the commissioners on fisheries and game are not in compliance with the requirements of R. L. c. 91, §§ 113, 114, in that the prohibition attempted to be made runs for all time, and not for a prescribed period of time, as required by law, and such acts are therefore void.

"4. That it does not appear that there has been any valid or legal prohibition of the taking of clams from the flats described.

"5. That the defendant may prove, as a complete defence to this complaint, that the flats from which said clams were taken by him were not contaminated and that the clams so taken were clean and wholesome, and fit for food."

The rulings were refused. The jury returned a verdict of guilty; and the judge reported the case for determination by this court.

C. W. Rowley, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

BRALEY, J. The facts not being in controversy, the question of the defendant's guilt or innocence depends upon the validity and meaning of R. L. c. 91, §§ 113, 114.

The general right of the inhabitants from the earliest times to take, within the flats and tidal waters of the Commonwealth, shell fish for the use of their families, while made subject to legislative regulations as to quantity, has never been denied. *Dill* v. *Wareham*, 7 Met. 438, 446, 447. *Commonwealth* v. *Bailey*, 13 Allen, 541. *Williams* v. *Delano*, 155 Mass. 10. R. L. c. 91, §§ 100, 101, 102.

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But when in the course of time the density of population had so increased that certain portions of such waters and flats became impregnated with sewage or deleterious substances from manufacturing establishments which affected and poisoned the imbedded shell fish, the Legislature, apparently for the protection and preservation of the public health, enacted the St. of 1901, c. 138, now R. L. c. 91, § 113, authorizing the State board of health upon complaint to delimit the contaminated area, and authorizing the board to request in writing the commissioners on fisheries and game to prohibit the taking therefrom of oysters, clams, quahaugs and scallops. The commissioners upon receiving the request are required to prohibit the taking of shell fish from the waters thus designated during such period of time as the board shall have prescribed, although by the St. of 1907, c. 285, clams and quahaugs may be taken for bait only, by any person having a permit in writing from the local board of health. See also St. 1911, c. 411, § 10. By § 114, upon the issuance and publication of the order of prohibition its violation is made a misdemeanor punishable by fine.

The statute is a valid exercise of the authority given by c. 1, § 1, art. 4 of the Constitution, to enact "all manner of wholesome and reasonable orders, laws, statutes, and ordinances" even if legislative functions to determine whether the conditions referred to in the statute exist are conferred upon the State board of health without giving to parties who may be interested an opportunity to appear and be heard. *Commonwealth* v. *Sisson*, 189 Mass. 247, 252.

But the defendant contends, that as the order, which must define not only the location of the prohibited territory but the duration of the prohibition, is dependent upon the terms of the "request," the order for the violation of which he has been convicted is void because the request is unlimited in time.

The "period of time" is to be defined in connection with the subject matter and purpose of the statute, the wording of which assumes that the contamination ultimately may cease and the fishery may be resumed safely. It being impossible except from observation and experience to determine when this condition will appear, the board is only required to name definitely the date from which the prohibition is to begin, although it may remain

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in force until the board are satisfied that its continuance is no longer necessary.

It moreover is only when the defendant has been deprived arbitrarily of taking uncontaminated shell fish for the sustenance of his family that he can complain of an invasion of his constitutional rights.

The proceedings shown by the record having been in conformity with the statute, the defendant's first four requests properly were denied, and the fifth, not having been argued, is to be treated as waived. By the terms of the report the verdict is to stand, and it is

So ordered.

THOMAS P. SMITH *vs.* ELLEN M. ABBOTT.
SAME *vs.* GORDON ABBOTT, executor.

Suffolk. March 24, 1915. — May 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Agency, Scope of authority. *Attorney at Law*. *Evidence*, Admission by silence, Self-serving statement. *Frauds, Statute of*.

A general power of attorney under seal, which, after a detailed recital of authority as to various matters conferred upon the attorney, states that he is given power "generally to do all acts and take all steps which in his judgment are necessary, convenient or expedient in the management of" the client's "property and affairs, although the matter should require more special authority than is herein contained, hereby giving my said attorney full power to act for me and in relation to my affairs, business and property as fully and with like effect as I could act if personally present," does not confer upon the attorney power to delegate his power to another unless a special provision to that effect is contained in its provisions or it appears from the nature of the agency that the parties contemplated that the employment of such agents would be necessary.

Each of two owners of a building in a city by separate instruments gave a general power of attorney to a certain person to manage the property for them, one instrument specifically conferring a power of delegation of authority, and the other omitting such a provision. The attorney gave to a second person in the name of both of his principals a power of attorney which purported to confer a power of delegation and substitution. The second attorney employed an attorney at law to collect the rent from a general lessee of the building and to eject such lessee for non-payment of the rent. In the course of negotiations with the general lessee, the attorney at law made an oral agreement on behalf of his principals that, if the general lessee would surrender his lease, they would

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indemnify him against loss by reason of claims by sublessees under leases which the general lessee had given. *Held*, that by reason of the failure of one of the owners specifically to confer a power of delegation and substitution, no such authority could be conferred upon the second attorney, that therefore the attorney at law did not derive from the powers of attorney any authority to make the agreement of indemnity, and that it could not be enforced against the owners of the building.

The mere employment of an attorney at law by the owner of a building to enforce the collection of rent due from a lessee or the ejectment of the lessee does not give to the attorney at law power to make with a general lessee of the building in behalf of his client and without the client's special consent an executory agreement to indemnify such general lessee against any loss he may suffer by reason of claims of sublessees under leases given by him.

It seems that an attorney at law by his general employment in a certain matter is not given authority to make an executory contract in behalf of his client in the nature of a compromise of his client's demand.

In an action for a breach of an alleged contract, a mere acknowledgment of the receipt of a letter from an attorney for the plaintiff and the referring of the writer to an attorney at law, the acknowledgment and reference being in a reply to the letter by a person purporting to act for the defendant, do not make the letter thus received admissible in evidence against the defendant, especially where it contains self-serving statements of the plaintiff's views of the relations of the parties and is introduced to show a ratification by the defendant of an unauthorized agreement made by his attorney.

An oral agreement that a surrender of a lease of land shall operate, as between the lessor and the lessee, as an assignment of the lease so that the lessor shall stand in the lessee's stead as to sublessees, is inoperative by reason of the provisions of R. L. c. 127, § 3.

TWO ACTIONS OF CONTRACT for breach of alleged oral agreements to hold the plaintiff, a lessee of property in Boston owned by the defendants, harmless as to claims by sublessees if he would surrender the lease, which he did. Writs dated December 4, 1911.

In the Superior Court the cases were tried together before *Stevens*, J. The material portion of the power of attorney given to Gordon Abbott by Elizabeth S. Bangs, the testatrix of the defendant in the second action, was as follows:

"Know all men by these presents that I, Elizabeth S. Bangs of Boston in the County of Suffolk and Commonwealth of Massachusetts, do hereby constitute and appoint Gordon Abbott of said Boston to be my true, sufficient and lawful attorney, for me and in my name and for my use, to sign, seal, execute and deliver any deed or deeds of any and all of my real estate, wheresoever situated; to make, execute and deliver lease or leases of the whole or any part of the same; to make contracts concerning any or all of my personal or real estate; to sell, transfer and deliver any

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and all of my personal property, including stocks, bonds or other muniments of title, and to sign, seal, execute and deliver any and all papers, deeds or instruments necessary, proper or convenient therefor; and in my name and for my use to make subscriptions for stocks, bonds or other securities, and to collect dividends, rents, profits, or any income whatsoever belonging to me; and in my name and stead to collect any and all claims and demands of every nature and description which I may now or hereafter have against any person, persons or corporation whatsoever, and on my behalf to sue for any and all sums of money now or hereafter due me, or for any rights that I may now or hereafter have, in any court of law or equity; and in my name and for my benefit to appear and answer and defend any action or actions, or suits either in law or in equity which may be brought against me in any court or courts of judicature, or to which I may be a party. Also to submit any matter in dispute to arbitration and to settle, adjust and compromise all claims and demands in which I am or may in the future become interested.

"And I further constitute and appoint said Abbott to be my true, sufficient and lawful attorney for me and in my name to make and endorse checks, notes and drafts; and, in his discretion, to transfer and deliver any of my property as security for any notes or obligations that he may make in my name and on my behalf; and to make any contract or contracts concerning the services of persons, and to terminate the same; to appoint one or more substitutes under him, under any power contained herein and the same to revoke at his pleasure; and generally to do all acts and take all steps which in his judgment are necessary, convenient or expedient in the management of my property and affairs, although the matter should require more special authority than is herein contained, hereby giving my said attorney full power to act for me and in relation to my affairs, business and property as fully and with like effect as I could act if personally present."

The power of attorney given to Gordon Abbott by Ellen M. Abbott was like that given by Elizabeth S. Bangs excepting for the omission from the second paragraph of the words, "to appoint one or more substitutes under him, under any power contained herein and the same to revoke at his pleasure."

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The other material facts are stated in the opinion. At the close of the evidence the judge ordered verdicts for the defendants and reported the cases for determination by this court.

T. W. Proctor, (*A. P. Teele* with him,) for the plaintiff.

M. J. Dwyer, (*B. E. Eames* with him,) for the defendants.

BRALEY, J. The plaintiff's cause of action rests upon the parol agreement alleged to have been made by the plaintiff, the lessee, with Charles H. Tyler, Esquire, acting as counsel for the lessors when the lease was determined for nonpayment of rent and the premises were surrendered. By the re-entry which followed the plaintiff's leases to subtenants would at once terminate, and, even if they attorned to the owners, the plaintiff would become liable in damages for breach of the covenant for quiet enjoyment. *Casassa* v. *Smith*, 206 Mass. 69.

It was to protect himself from this liability that in consideration of the surrender, as he testified, the agreement of indemnity was entered into, and for the purposes of decision his testimony may be taken as true, as the jury could have believed him notwithstanding the evidence in contradiction introduced by the defendants.

But if, without deciding, it is assumed that what was said during the negotiations could be found to be an unqualified promise to indemnify and save the plaintiff harmless from liability to the sublessees, and the judgment recovered by one of them in *Casassa* v. *Smith*, 206 Mass. 69, after the lessors had been properly vouched in to defend, entitled the plaintiff to sue for damages, they never became bound unless Mr. Tyler was authorized to make the contract in their behalf. The lessors and owners in making the lease and in the collection of the rent and the management of the premises acted through Gordon Abbott, their duly appointed attorney. And from his evidence the jury could have found that the respective powers of attorney from the defendant, Ellen M. Abbott and Elizabeth S. Bangs, since deceased testate and of whose will Gordon Abbott is executor, which were given after the date of the lease, "were practically a duplication of the earlier powers" of attorney, copies of which are part of the record. It would follow from this finding and an examination of the copies that the power of attorney under seal, given by him in their joint names to Charles E. Cotting, while in accordance

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with the instrument of Bangs, permitting him to "appoint one or more substitutes under him," was unauthorized as to Ellen M. Abbott by whom no power of delegation had been conferred. The trust and confidence reposed in him by the terms of the power, where he was to exercise his discretion and judgment in the performance of his duties, could not be delegated to another without the consent of his principal, unless from the nature of the agency it appeared that the parties contemplated that the employment of subagents would be necessary; a condition which does not appear in the case at bar. *Appleton Bank* v. *McGilvray*, 4 Gray, 518, 521. *Dorchester & Milton Bank* v. *New England Bank*, 1 Cush. 177.

But having been given full authority by each principal to manage and convey the property, and if necessary to terminate the lease for breach of condition, the jury also could find from his evidence that upon being informed of the plaintiff's failure to pay the rent, which had fallen into arrears, he directed Cotting to employ counsel, "to try and collect the back rent, and, failing the success in that, to terminate the lease."

It is undisputed that Cotting accordingly retained Mr. Tyler, by whom an action of ejectment was brought in which judgment, with the plaintiff's consent, was not obtained until after the premises had been surrendered, under the agreement for termination, indorsed on the lease and executed by the plaintiff and the lessors through their attorney, Abbott.

While the jury could have found from the plaintiff's evidence that Mr. Tyler informed Cotting of the negotiations and the proposed agreement, yet it is plain that Cotting could not empower Mr. Tyler to bind the lessors. Nor could the counsel under his retainer make an executory contract of indemnity in the nature of a compromise of their demands which would be binding on his clients. *Lewis* v. *Gamage*, 1 Pick. 347. *Shores* v. *Caswell*, 13 Met. 413. *Riley* v. *Boston Elevated Railway*, 195 Mass. 318, 322. *Pomeroy* v. *Prescott*, 106 Maine, 401. 21 Ann. Cas. 574. See note, page 577, for a full collection of cases.

The lessors' right to possession and the termination of the lease did not depend upon the making of the agreement, but upon the proceedings in ejectment to which the plaintiff at the time of the agreement admitted that he had no defence. It was not

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even a step in the regular course of litigation, of which the giving of a bond of indemnity in the client's name to an attaching officer, or to a third party as security during the action, are illustrations. *Ford* v. *Williams*, 13 N. Y. 577, 586. *Swartz* v. *D. S. Morgan & Co.* 163 Penn. St. 195. *Clark* v. *Randall*, 9 Wis. 135. Compare *White* v. *Davidson*, 8 Md. 169.

But as an unauthorized agreement or compromise may be ratified by the client, the plaintiff contends that the letter of his attorney to Gordon Abbott, nearly six years after the transaction had been closed, reciting the agreement and the conditions under which it was made was admissible as proof of ratification. *Cohen* v. *Jackson*, 210 Mass. 328. The jury undoubtedly could have found that the letter was in response to Abbott's request made after an interview with the attorney when he stated his client's demands. But neither Abbott's failure to answer this letter, nor the reply acknowledging its receipt and referring the writer to counsel, written by Cotting, because of Abbott's absence from the country, to the second letter requesting an answer, is evidence of an assent to the self-serving declarations found therein supporting the plaintiff's claims. *Perry* v. *Pye*, 215 Mass. 403, 411. *Pye* v. *Perry*, 217 Mass. 68, 71, and cases there cited. The letters were not in the nature of mutual correspondence between the parties concerning the transactions in dispute, in which their respective claims were stated and admissions made, as in *Stone* v. *Sanborn*, 104 Mass. 319, *Thomas* v. *Wells*, 140 Mass. 517, and *Buffum* v. *York Manuf. Co.* 175 Mass. 471, cited by the plaintiff.

The record moreover does not show that with knowledge of what had been done the lessors, or their attorney, Abbott, accepted the benefits which might be derived from a surrender. If this appeared, there would have been evidence for the jury of acquiescence. *Huston* v. *Mitchell*, 14 S. & R. 307, 309, 310. The action of ejectment, as we have said, was pending, and there is no evidence that when Abbott signed the indorsement he had been informed of the negotiations, or of the agreement, and Cotting's knowledge could not affect the lessors.

To the plaintiff's remaining contention, that by accepting the surrender the defendants as matter of law became bound as assignees of the term to protect the plaintiff from liability to the

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sublessees, the short answer is that the declarations contain no count upon the alleged cause of action. It is apparent, however, from the plaintiff's own evidence and the indorsement, which is not impugned, that the premises were surrendered and the lease was not assigned.

But even if susceptible of the plaintiff's interpretation, the agreement, not having been in writing, had only the force and effect of an estate at will and therefore it cannot operate as an assignment. R. L. c. 127, § 3. *Sanders* v. *Partridge,* 108 Mass. 556, 559.

By the stipulation of the parties judgment in each case is to be entered for the defendant.

So ordered.

BENJAMIN P. CHENEY *vs.* FRED J. TABER & others.

Suffolk. March 24, 1915. — May 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, & CARROLL, JJ.

Contract, What constitutes. *Equity Jurisdiction,* To enforce return of property entrusted to defendant conditionally.

Where one, who is desirous of purchasing from several owners certain shares of stock in a corporation and other personal property, which have been offered to him for cash, procures a modification of the terms of sale so that notes will be accepted in part payment and then procures acceptable notes from one who is to share in the enterprise and who sends the notes to him with a letter stating "I understand that these notes are to be substituted for part of the cash consideration paid to the vendors . . . and that, of course, in the event of the deal not being completed the notes will be returned on demand;" and where the vendors receive the notes and read the foregoing letter and then the transaction is not completed because of a failure to pay the balance of the purchase price in cash and the vendors do not deliver any of the shares of stock or other property, the maker of the notes is entitled to have them returned to him by the vendors, who are not holders in due course, and may enforce that right by a suit in equity.

BILL IN EQUITY, filed on July 20, 1914, against Fred J. Taber, Harry L. Bagley, William F. Cox and Fred A. Wineke, alleging that the plaintiff delivered to the defendant Cox, with the following letter, the four notes therein described:

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"The Biltmore, New York,
April 22, 1914.

"Mr. William F. Cox,
115 Broadway,
New York, N.Y.

"Dear Sir: Mr. Carlisle has outlined to me the details of the 'Mount Vernon' whiskey deal, in which I participate with him in his share of the profits, and I am enclosing herewith the following notes for use in connection therewith, as stated below:

"Two notes of $15,000 each, six months from April 10th.

"Two notes of $10,000 each, six months from April 10th.

"I understand that these notes are to be substituted for part of the cash consideration paid to the vendors, thereby realizing $50,000 against the same, and that, of course, in the event of the deal not being completed the notes will be returned on demand.

"At your convenience I would be glad to have a letter showing the transaction in detail and how and where the notes are being used.

Very truly yours,
Benjamin P. Cheney."

The bill further alleged that Cox delivered the notes to the other defendants, exhibiting to them the plaintiff's letter; that the defendants had not completed the transaction, but that they refused to redeliver the notes. The prayers were for injunctions restraining the defendants from transferring the notes and for a decree directing their delivery to the plaintiff.

The case was heard by *Pierce*, J., a commissioner having been appointed to take the evidence. The judge filed the following memorandum of his findings:

"1. I find that on and before April 22, 1914, the day when the letter accompanying the notes was delivered by Carlisle, acting in this regard for the plaintiff, Cheney, the only 'deal' contemplated by Carlisle or Cox or any of the defendants required, as a condition of passing of title, an actual cash consideration; and that Cheney did not authorize the use of his notes for any purpose other than in 'substitution' of a part of the actually paid in, or to be paid in, cash consideration. While it might be possible to treat a draft, if paid within the usual commercial period, as a

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cash payment, the mere drawing and acceptance of a draft is not such.

"2. I find that in this case Cheney did not authorize any contractual method by means of which the obligation of the parties should stand as and for a cash consideration, or in any manner waive the terms of the letter. It follows that no one was authorized to deliver Cheney's notes to the end that they stand as his legal obligation.

"3. The several defendants are to be ordered to deliver to the plaintiff, within twenty days from the entry of this decree, the four several notes described in the bill with costs."

The other material facts are stated in the opinion.

A decree was made in accordance with the memorandum; and the defendants Taber and Bagley appealed.

A. Black & C. F. Eldredge, for the defendants Taber and Bagley.

S. M. Child, for the plaintiff.

BRALEY, J. The defendants admit that they either knew of the contents or had read the plaintiff's letter under which Cox had been authorized to act as his agent, and no general or discretionary powers having been given they never became holders in due course, unless the plaintiff's promissory notes, entrusted to him, were delivered in accordance with the instructions. R. L. c. 73, § 69. *Fillebrown* v. *Hayward,* 190 Mass. 472. *Allen* v. *Puritan Trust Co.* 211 Mass. 409, 422. *Record* v. *Littlefield,* 218 Mass. 483.

It appears that Taber and Wineke, to whom we shall refer as the defendants, were the owners of a majority of the common stock of the Mt. Vernon Distilling Company, as well as of certificates representing a large number of barrels of its whiskey held in bond, and Cox, who was seeking to acquire this property, solicited one Carlisle to interview the plaintiff and procure the notes in aid of the purchase upon the understanding that the plaintiff should participate in the expected profits.

The negotiations which followed resulted in an option of purchase under which the defendants were to receive the selling price in cash, but they finally agreed with Cox to accept the notes in part payment. While the notes were handed over and immediately divided between the defendants, the remainder of

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the consideration was never paid, as the draft therefor subsequently given by Cox to Taber was dishonored, and neither the stock nor the certificates have been transferred.

It is manifest that, the payment of the balance having been a condition for the transfer of title, the transaction never has been consummated. *Scudder* v. *Bradbury*, 106 Mass. 422, 427. *Haskins* v. *Warren*, 115 Mass. 514, 533.

The defendants in their answers disclaim any purpose to take advantage of the expiration of the option and assert that a binding contract having been made, which has been broken by the purchaser, the notes are enforceable.

We are now prepared to consider the application of the letter to these transactions, concerning which the plaintiff is not shown to have had any knowledge until informed of the fruitless result, and that the notes though he demanded their return were in the possession or control of the defendants, who claimed them as part of the consideration for the sale.

Their number and tenor having been fully described, authority to use them is found in the words, "I understand that these notes are to be substituted for part of the cash consideration paid to the vendors, thereby realizing $50,000 against the same, and that, of course, in the event of the deal not being completed the notes will be returned on demand." To the request which followed, "At your convenience I would be glad to have a letter showing the transaction in detail and how and where the notes are being used," no reply was ever vouchsafed by either Cox or the defendants or any information whatever furnished.

If the defendants' construction of the letter is adopted, that Cox was empowered to substitute the notes at their face value "for part of the cash consideration," it cannot be contended successfully that the plaintiff also intended to part with his money unless the vendors passed the title.

Nor have the defendants pointed out from what source "his share of the profits" could come, if they are entitled to retain the stock and the bonded whiskey and collect the notes. The plaintiff, when he said, "in the event of the deal not being completed," did not mean the entering into by the parties of an executory contract, but of a sale by which title to the property would be acquired. It is certain that he did not intend to invest unless the

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balance of the consideration was obtained and concurrently paid over. If this was done, then and not until then could the notes be used and treated as partial payment.

The defendant Bagley is the broker employed by Taber and Wineke to whom, when the notes were divided, they each delivered one note for $10,000 in payment for services, and his testimony shows that having sold one he retained the other note.

The defendant Taber also testified that shortly after obtaining it he disposed of the note for $15,000, while Wineke, who has not appealed, holds the remaining note for a like amount.

But the credibility of the witnesses was for the presiding judge. *Taber* v. *Breck*, 192 Mass. 355. And there is no positive evidence that any of these notes had passed irrevocably beyond the control of the respective appellants. If their defence is not sustained, they moreover have not questioned the form of the decree which ordered the defendants to return the notes to the plaintiff within a specified time. *Fuller* v. *Percival*, 126 Mass. 381, 382, 383. It is therefore affirmed with costs.

Ordered accordingly.

JULIUS J. COHEN *vs.* KATE LEVY & another.

Suffolk. March 3, 4, 1915. — May 24, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Parties, Appeal, Decree. *Fraud*, As against creditors.

Upon the granting of a motion made by the plaintiff in a suit in equity that a certain person be joined as a party defendant, such person does not become a defendant until he has been served with a subpoena or has appeared voluntarily.

In a suit in equity against two defendants to reach and apply in payment of a debt, owed to the plaintiff by one of the defendants, property conveyed by that defendant in fraud of his creditors to the other defendant, on an appeal by the defendants from a final decree which directs that persons who are not parties to the suit shall deliver certain property to the plaintiff, the decree must be reversed.

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It here *was stated* as a recognized rule, that, in order that a transfer of property by a debtor to a purchaser for value but in fraud of creditors of the seller should be voidable by such creditors, the purchaser must actually have known of or have participated in the fraudulent purpose of the seller.

RUGG, C. J. This is a bill to reach and apply property of the defendant Levy in the hands of the other defendant, Harry L. Lurie. At the trial it developed that the title to the property in question had been transferred to Yetta Lurie and a motion by the plaintiff to join her as a party defendant was allowed.* Of course this without more did not make her a party. There is nothing in the record to show that service was made upon her, or that she ever appeared or filed an answer. Further, it being recited in the final decree that the goods sought to be reached and applied have been sold at auction by one Guttentag, a constable of the city of Boston, the decree proceeds, that in the event of failure by the debtor defendant to pay the plaintiff's debt, "then the said Joseph Guttentag, constable, is directed and ordered to deliver unto the plaintiff from the proceeds of such sale and it is ordered that the proceeds of such sale shall be applied by said Joseph Guttentag" toward the payment of the plaintiff's claim.

All this was irregular. The motion to join Yetta Lurie as a party having been allowed on the ground that she had a real interest in the goods, the plaintiff then, if she did not appear voluntarily, ought to have caused her to be summoned to appear in court and then to have moved to have the bill taken for confessed if she failed to appear. If the property or its proceeds which the plaintiff wanted to reach was in the hands of Guttentag, he also should have been joined as a party. There is nothing in the record to show his relation to the goods. For aught that appears, he may have attached the goods on a writ in favor of an innocent creditor of Harry Lurie or Yetta Lurie. No decree in a case like the present can run against a stranger until he has been made a party to the suit and is subject to the jurisdiction of the court.

* The case was heard by *Wait*, J., on March 16, 1914. He ordered a decree on March 27 and filed a memorandum of findings on May 18, 1914. On July 30 the motion to join Yetta Lurie as a party defendant was filed "as of March 16" and it was allowed on August 4. The final decree was entered on November 19.

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The order for the final decree in conventional form simply states the conclusion of law that the conveyance was made to hinder, delay and defraud creditors, and, in order to understand and interpret it, resort must be had to the finding of facts made under R. L. c. 159, § 23. That finding, so far as material, is printed in a footnote.* It is not plain. A debtor at common law has a right to exhaust his property in the payment of one or more of his creditors in full, in preference to and to the exclusion of others. *Giddings* v. *Sears*, 115 Mass. 505. It is not necessary to determine whether a debtor may sell lawfully his property to a third person for a fair price, with a genuine purpose to apply the proceeds to the payment of some creditors in preference to others. *Clements* v. *Moore*, 6 Wall. 299. *Gregory Tilton & Co.* v. *Harrington*, 33 Vt. 241. *Priest* v. *Brown*, 100 Cal. 626. The finding is not explicit upon the point whether Kate Levy had an intent to do more than pay the debt due to her son in preference to her other creditors. The inadequacy of the consideration paid by Lurie, together with other circumstances, was evidence sufficient to warrant a finding of fraudulent purpose on her part. Nor does the finding go to the extent of saying that Lurie knew of or participated in an intent of Kate Levy to hinder, delay or defraud her creditors. If a transaction is "honest enough," it is somewhat difficult to regard it as a conscious part of an unlawful scheme to defraud the creditors of another. If, however, Lurie knew of

* "Kate Levy was doing a poor business and owed creditors she did not see her way to pay. She had a stock worth several hundred dollars.

"She had borrowed from her son and desired to repay him $225, so that he might get an engagement ring for his betrothed, and he was pressing for his money. To pay him, she arranged to borrow of her son-in-law, Lurie, who was willing to lend $250, but wanted security. After inquiry of a lawyer, he was informed he could lend, take a mortgage on her stock of goods, take possession immediately and foreclose at once if she did not pay. He loaned $250, to be repaid $25 per week, took the mortgage and possession, and then at the end of a week, when on demand she failed to pay the $25, gave the proper statutory notices and foreclosed, his wife buying in at the sale.

"This transaction was honest enough on Lurie's part, but he knew the situation and was really hindering and delaying the creditors of Mrs. Levy. I believe he paid over his own money and expected to be able to hold a valid mortgage, but the whole transaction was devised to enable Mrs. Levy to pay for her son's engagement ring. Lurie was unwilling to lend to the son, and was unwilling to lend without security."

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all the facts, and knew that the defendant Levy intended to hinder, delay and defraud her other creditors in substance by selling all her property for considerably less than it was worth, and intended to aid in the execution of that intent, simply supposing that the device adopted was sufficient to circumvent all legal objections, then he is not protected if the assumption turns out to have been wrong. In order to set aside a transfer made in fraud of creditors by the seller, the purchaser, if paying a valuable consideration, actually must know of or participate in the fraudulent purpose of the seller. *Wadsworth* v. *Williams*, 100 Mass. 126. *Pierce* v. *O'Brien*, 189 Mass. 58. *Gately* v. *Kappler*, 209 Mass. 426, 431.

But these points cannot be decided upon this record, for the reason that they affect the rights of Yetta Lurie and Guttentag, neither of whom have been made actual parties or been heard.

Decree reversed.

M. H. Steuer, for the defendants.

W. Charak, (*J. Robbins* with him,) for the plaintiff.

HENRY DUNSTER & another *vs.* MARIA H. GOWARD.

Plymouth. March 15, 16, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Probate Court, Appeal. *Practice, Civil*, Exceptions. *Evidence*, Relevancy and materiality.

If, at the trial by a jury in the Superior Court of issues framed upon an appeal from a decree of the Probate Court allowing a will, there is evidence warranting findings in favor of the proponent of the will and the jury so find, the appellant cannot bring to this court the question whether such findings were against the weight of the evidence by an exception to a refusal of the presiding judge to order answers for him upon the issues.

Where, at the trial of issues, framed on an appeal from a decree of the Probate Court allowing a will and relating to the testator's mental capacity and as to whether undue influence was exerted upon him, it appears that the testator stated in the will that his reason for leaving nothing to the appellant, who was his sister and his sole heir at law, was that she had abundant property for her needs, the appellant may be asked in her cross-examination as a witness to state the amount, kind and location of her property.

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APPEAL by Maria H. Goward, a sister and sole heir at law of Horace W. Howard, late of West Bridgewater, from a decree of the Probate Court for the county of Plymouth allowing the will of said Howard.

In the Supreme Judicial Court the following issues were framed and were sent to the Superior Court to be tried by a jury:

"1. Whether said Howard was of sound, disposing mind at the time of the making and executing of the will.

"2. Whether he had been unduly influenced to make said will by one Sarah J. Burns and one Henry Dunster, or either of them."

The issues were tried in the Superior Court before *Raymond*, J. The jury answered the first issue in the affirmative and the second in the negative; and the appellant alleged exceptions to the refusal of the presiding judge to order answers for her upon the issues, to make certain rulings asked for by her and to certain instructions which were given.

The material facts are stated in the opinion.

R. O. Harris, for the appellant.

A. F. Barker, (*J. E. Collins & R. H. Gladding* with him,) for the appellee.

PIERCE, J. The evidence in favor of the validity of the will and against the assertion of fraud and undue influence was substantial and required the submission of the issues to the jury. The contestant has not argued otherwise, but asserts her right, under a request for a directed verdict, to bring all the evidence before the Superior Court to this court for review of facts as well as law.

There is no authority in this Commonwealth for such procedure. *Crocker* v. *Crocker*, 188 Mass. 16. A submission of issues of fact to be tried by a jury is expressly authorized. R. L. c. 159, §§ 36, 38; c. 162, § 25. In the case at bar the jury found, upon consideration of the submitted issues of fact, that the testator at the time of the execution of the will was of sound, disposing mind and memory, and also that the will was not procured by the undue influence or fraud of Sarah J. Burns and Henry Dunster, or either of them.

These findings are conclusive upon the parties and upon this court until set aside, for good cause shown, by the trial judge in the

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exercise of his discretion, or by this court because of error of law. *Franklin* v. *Greene*, 2 Allen, 519, 522. *Perry* v. *Shedd*, 159 Mass. 200. *Crocker* v. *Crocker*, 188 Mass. 16. In view of the undisputed record facts the judge well might have granted a new trial; but it also was given to him to see the witnesses and to hear their testimony, and we have no power to revise his judgment. *Capper* v. *Capper*, 172 Mass. 262. *Ingalls* v. *Oliver*, 198 Mass. 345.

The contestant has not specifically argued upon her brief any exception taken to the charge, to the refusal to charge, or to the allowance of the cross-examination of the contestant as to the amount, kind and location of her property; therefore these exceptions might be treated as waived; *Bacon* v. *Bacon*, 181 Mass. 18; but we prefer to pass judgment upon them.

The testator, before executing his will, and in the will itself, gave as a reason for omitting to make a devise or bequest to the contestant the alleged fact that she had an abundance of property for her needs. That he was not acting under a mistake in this regard was material to the issue of his capacity to appreciate the just claim to his bounty of his only kin. *Davenport* v. *Johnson*, 182 Mass. 269. The exception to the cross-examination was not well taken. *O'Connell* v. *Dow*, 182 Mass. 541, 546.

The law governing the testator's capacity to make the will and that relating to fraud and undue influence was fully and accurately stated.

The requests for rulings so far as they accurately stated the law were given in substance, and no just complaint lies to the refusal to give the others.

Exceptions overruled.

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ATTORNEY GENERAL *vs.* ONSET BAY GROVE ASSOCIATION.

Plymouth. March 18, 1914. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Waiver of demurrer. *Parks and Parkways,* Dedication. *Dedication. Easement,* Of public. *Seashore.*

In a suit in equity, where the defendant has filed a demurrer and also an answer, the reference of the case to a master to find the facts without any objection on the part of the defendant and the appearance of the defendant at the hearings before the master are a waiver of the demurrer.

A dedication of land to the use of the public for a park or pleasure ground need not be in writing and may be shown by oral statements of the landowner or of those authorized to act in his behalf, or by acts of the landowner from which his intention can be inferred.

Upon an information in equity filed by the Attorney General at the relation of the people of a seashore resort established by a corporation, whose purposes were to provide a place for holding camp, grove and other meetings of a social and religious character and to create and establish a popular summer resort, brought to enjoin the corporation from selling or obstructing certain parks, groves and shore fronts the use of which was alleged to have been dedicated to and accepted by the public, on the findings contained in a master's report it was *held,* that there was evidence that the corporation by its acts and declarations had dedicated the use of the lands in question to the public and ample evidence of acceptance by the public, and that the corporation should be enjoined from selling, leasing or obstructing its parks, groves and shore fronts which were subject to the public easement thus acquired.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on July 5, 1899, by the Attorney General at the relation of the people of the village of Onset, alleging that the defendant, a corporation organized under the laws of this Commonwealth, in 1877 bought a large tract of land in the town of Wareham known as Oak Grove Bluff and containing about one hundred and fifty acres; that the business of the defendant and the purpose for which it was organized was the holding of personal property and real estate where a wharf, hotel and other public buildings might be erected, and building lots sold or leased for the erection of private residences or cottages; that in pursuance of the general plan of conducting this business the defendant divided the tract into lots, which it offered to the public for sale, and laid out streets,

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avenues and paths through and over the tract, and marked and reserved certain open spaces as and for parks, which streets, avenues, paths and parks the defendant dedicated as such to the public forever, and the public accepted the same; that the defendant made plans of the tract, showing thereon what portions of the tract were to be sold or leased for cottages or buildings, what portions were to be reserved for parks and what portions were to be used as streets, avenues and paths, and caused the plans to be recorded in Plymouth County; that the defendant published numerous copies of these plans and many other and divers advertisements, pamphlets, circulars and notices, and gave them wide and extensive circulation for the purpose of attracting the public and inducing the public to buy the lots of land that the defendant had for sale; that the tract had a very long shore front on the east, south and west; that along a large part of the shore front on each side was a high bluff, and along this bluff all around the tract, a short distance back from high water mark, there was laid out on the plan and was wrought and constructed upon the ground a street or avenue called on the east shore the East Boulevard, on the south shore the South Boulevard and on the west shore the West Boulevard and that the whole of the tract set apart for sites or lots for buildings or cottages, as indicated on the plans and on the advertisements and as staked out on the ground, was on the inner or land side of the boulevards; and that in and by the plans and advertisements, and in and by the construction of the boulevards and the laying out of the tract of land, it was clearly indicated that, with the exception of one wharf, the whole of the water front was to be left open and unobstructed, and that no part of it was to be sold for or occupied by buildings; that the association dedicated to the public the whole of the shore as a bathing beach and as a park and as an open space, to the use of the public as such bathing beach, park and open space forever, and that the public duly accepted the same; that the defendant, by means of the plans and advertisements, and by means of many and repeated oral promises and declarations, covenanted and agreed with the public that the parks, streets, avenues, paths and shore fronts should be forever kept and used respectively as parks, streets, avenues, paths and shore fronts for bathing,

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boating and fishing, substantially as indicated upon the plans and as then laid out upon the ground, and that the same should be and were dedicated to the public forever for such use by the public; that the public had faith in the covenants, promises and agreements of the defendant and relied upon the same, and that many hundreds of persons bought lots of land in the tract and erected many costly buildings and cottages thereon; that upon the tract there was at the time of the filing of the bill a large and flourishing village known as Onset; and that during the summer months hundreds and thousands of people daily resorted to and used such parks, streets, avenues and paths, and the shore front for bathing, boating, fishing, recreation and pleasure; that the defendant claimed the absolute ownership of these parks, streets, avenues, paths and shore fronts, and denied the right of the public freely and uninterruptedly to use and enjoy the same as parks, streets, avenues and paths, and for bathing, boating and fishing, and the uninterrupted view of the water and the full enjoyment of the cool and refreshing breezes from the water; and that the defendant, in defiance of the rights of the public and in violation of its promises, covenants and agreements made to and with the public in regard to the parks, streets, avenues, paths and shore fronts, had erected, and permitted to be erected, cottages and buildings on lands dedicated to the public as parks, and known by the names of Pavilion Park, Waban Square, Prospect Park, the Hitching Ground, Waban Grove, Bay View Grove, and the Camp Ground; had erected and put a fence across Waban Avenue, thereby obstructing public travel; had enclosed by fences parts of each of the parks known as Union Square, Pavilion Park, Waban Square and Prospect Park, and thereby excluded the public therefrom, and had obstructed the paths there dedicated to the public; had erected and permitted to be erected buildings, booths and stands along the shore front near Bay View Grove; had erected and permitted to be erected houses and buildings along the shore front just outside of West Boulevard, and at the foot of Third Street and near the wharf; had erected and permitted to be erected along the shore fronts in numerous places bath houses for private use, and had let the same for hire.

The prayers of the bill were that due inquiry might be had, and

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the right of the public ascertained and declared, and that the defendant might be enjoined from selling, conveying, leasing or otherwise disposing of any part of these parks, streets, avenues, paths and shore fronts, or any part thereof, so as to interfere with the public use of the same for each and every public use thereof which the public had; and that the defendant should be required and commanded forthwith to remove any and all fences, buildings and other structures from the parks, streets, avenues, paths and shore fronts, or any part thereof; and for further relief.

The defendant demurred to the bill and also filed an answer. Later the case was referred to Warren A. Reed, Esquire, as master, "to find the facts and report the same" to the court with such parts of the evidence as either party might request. It does not appear that any objection to the order of reference was made by the defendant. Hearings were had before the master, who on January 18, 1905, filed his report.

On January 20, 1905, the defendant filed exceptions to the master's report, among which the exceptions founded on the following objections related to the admission of evidence and were the only ones argued before this court:

1. For that the master admitted evidence of representations made by persons who had been officers of the defendant which was inadmissible and incompetent.

2. For that the master admitted the evidence of certain witnesses who testified to representations made to them by officers of the defendant corporation which was inadmissible and incompetent.

3. For that the master admitted the evidence of John L. Willis, of Quincy A. Bird, and of L. E. Bullock, who testified to representations made to them by B. H. Bourne, which was inadmissible and incompetent.

4. For that the master admitted evidence of certain representations made by Benjamin F. Gibbs and B. H. Bourne, as agents of the defendant corporation authorized to make representations binding it, to the dedication of its land, when said Gibbs and Bourne were not agents, but only servants, of the corporation, and that said representations were admitted in evidence as tending to prove a dedication of land by the association without proof that said Gibbs and Bourne had any au-

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thority, by vote of the association or its directors, to bind the association relative to the dedication of its land.

5. For that the master admitted evidence of representations of the officers and alleged agents of the association, as tending to prove a dedication of its land, without offering evidence to prove that before said representations were made the association had formed an intention to dedicate its land.

6. For that the master admitted evidence of representations made by officers and alleged agents, as competent to prove a dedication of land, without requiring the relators to show, and without the relators contending that they had any evidence tending to show, that there had been any corporate act of the association itself, or any vote by its board of directors, to dedicate the land to public uses.

On April 18, 1908, the case came on to be heard before *Hammond*, J., and by the consent of the parties was reserved for determination by this court upon the pleadings, the master's report and the exceptions thereto.

On March 18, 1915, the case was submitted on briefs.

F. Joy & R. Clapp, for the defendant.

N. Washburn, for the relators.

BRALEY, J. The reference to the master having operated as a waiver of the demurrer, the questions for decision are whether any of the defendant's exceptions to the report are well taken and whether, upon the facts reported, the information can be maintained. *Driscoll* v. *Smith*, 184 Mass. 221.

The master was appointed to find the facts, and as the counsel for the defendant has argued only the exceptions relating to the admission of evidence, the remaining exceptions to alleged erroneous rulings of law are to be treated as waived. But, as the admissibility of the evidence is so interwoven with the principal question of dedication a separate discussion is unnecessary. The events as narrated by the master, preceding and subsequent to the incorporation of the association which acquired title to the tract described in the information, leave no doubt of the purpose of the incorporators, not only to provide a place for holding camp, grove and other meetings of a social and religious character, but to create and establish a popular summer resort. St. of 1877, c. 98, § 1. *Nye* v. *Whittemore*, 193 Mass. 208.

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The location on Onset Bay and East River, with the natural surroundings of woodland, combined with the scheme adopted by the defendant to dispose of the land to purchasers, have resulted in large sales of lots and the erection by the owners of houses, hotels and buildings for commercial purposes, until from small beginnings the entire territory for transient as well as permanent residence has all the characteristics of a populous village.

It is also clear from the report that the present litigation would not have arisen if the association had not asserted the right to sell or lease portions of the parks, groves, squares, avenues, boulevards and shore fronts, delineated on the plan of the entire property which it caused to be prepared and filed in the registry of deeds. The streets or avenues, some of which have become public ways, could not be closed or materially encroached upon by the common grantor, as the purchasers of the lots have the right to their free and unobstructed use for ingress and egress as shown by the plan when they acquired title. *Downey* v. *Hood & Sons*, 203 Mass. 4. *Flagg* v. *Phillips*, 201 Mass. 216. *Drew* v. *Wiswall*, 183 Mass. 554, 555. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. *Farnsworth* v. *Taylor*, 9 Gray, 162.

No burden, however, is imposed on the public until the avenues and boulevards are laid out and established as required by statute, or unless they have become highways by prescription. R. L. c. 48, § 98. *Bassett* v. *Harwich*, 180 Mass. 585. *Bigelow Carpet Co.* v. *Wiggin*, 209 Mass. 542, 549. *Bartlett* v. *Bangor*, 67 Maine, 460.

If the parks, squares, groves and shore fronts are built over, it is obvious that contiguous estates will be greatly impaired in value and the community itself will suffer from the taking away of conditions of light, air, prospect and recreation, essential to its attractiveness as a shore resort as well as to its future residential growth.

The entrance of the public upon them and the enjoyment of the privileges understood to have been offered fully appears in the report. Indeed, an uninterrupted general public use had continued for more than twenty years previous to the information. *Abbott* v. *Cottage City*, 143 Mass. 521, 525. *Cincinnati* v. *White*, 6 Pet. 431. *The Queen* v. *Chorley*, 12 Ad. & El. (N. S.) 515.

But, if ample evidence of acceptance appears, the inquiry re-

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mains whether the association had dedicated the use of these lands to the public. No formalities were necessary. It is settled at common law that the dedication need not be in writing. *Alden Coal Co.* v. *Challis*, 200 Ill. 222. Its validity depends upon the intent and consent of the owner, who of course retains the fee. *Wright* v. *Tukey*, 3 Cush. 290. *Hayden* v. *Stone*, 112 Mass. 346. *Attorney General* v. *Abbott*, 154 Mass. 323. It may spring from oral declarations or statements by the dedicator, or by those authorized to act in his behalf, made to persons with whom he deals and who rely upon them; or it may consist of declarations addressed directly to the public. *Pierce* v. *Roberts*, 57 Conn. 31. *State* v. *Atherton*, 16 N. H. 203. It also may be manifested by the owner's acts from which such an intention can be inferred. *Wright* v. *Tukey*, 3 Cush. 290. *Smith* v. *Flora*, 64 Ill. 93.

The plan, in accordance with which house lots were put upon the market and sold, shows as we have said the avenues and boulevards, the parks, squares, groves and an unobstructed frontage on the water. And the master finds that the association issued for several years circulars in large numbers, stating that heliotype copies of the plan could be had on application to its president or secretary, while the directors annually appointed an agent of the association and a committee "to attend to the sale of lots and to have general oversight of the local interests and public property of the association during the ensuing season."

This committee bargained with prospective customers for the sale of lots and, sales having been made, the association executed the deeds. The evidence that in effecting sales one Gibbs, a member of this committee and who also acted at various times as agent, director and treasurer, called the attention of purchasers to the groves and open spaces appearing on the plan and informed them that they had a right to use the ways and the "shore reserves," as well as evidence of similar statements made on several occasions by the directors, including the president and the other agents entrusted with the sale of lots, was clearly admissible.

The defendant, as appears in the annual reports of the treasurer, having received the proceeds of the sales, with knowledge on the part of its officers of the conditions under which purchasers were induced to buy, is bound by the representations made

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for its benefit. *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 180, 182. *Beacon Trust Co.* v. *Souther*, 183 Mass. 413, 416, 417.

If, when sales were negotiated, the defendant's officers and agents had stated or even intimated that the right to divide the open spaces into building lots after the resort should be established was reserved, there can be no doubt sales would have fallen off and very likely the whole enterprise would have been in jeopardy. As was said in *Attorney General* v. *Abbott*, 154 Mass. 323, 326, "If the corporation had an intention to reserve this right, the course pursued of inviting purchasers was inconsistent with common honesty."

But evidence of the intention of the defendant is not confined to the plan, the sale of lots, or the circumstances under which they were sold. The annual report for several years, which was accepted by vote of the association, contained these statements: "Parks and Groves. Waban Grove, 5 acres; Bay View Grove, 2 acres; Pavilion Park, 1½ acres; Prospect Park, 3 acres; Shell Point Grove, 2½ acres; Longwood Park, 1 acre; Wabasso Park, 1 acre; Camp Ground, 6 acres; Shore Land, 25 acres, more or less. . . . The value of pleasant parks and beautiful groves to complete the desired effect of our beautiful summer resort, both as a sanitary measure and an indispensable pleasure retreat, are too sacred to be estimated with figures, and they should never be encroached upon, except to be made more attractive with pleasant walks, shrubs and flowers." "Our parks and groves, when viewed in the light of sanitation and pleasure, and beautifying of Onset as a summer home and spiritual resort, are priceless, and cannot be too carefully protected and guarded from encroachment of every nature. . . . Our parks and groves have no real cash value, as they are indispensable shore retreats and should never be encroached upon, only to beautify and adorn. . . . Our parks and groves have no relative cash value, as they are an indispensable pleasure retreat, and are looked upon as such by the town assessors and are not taxed." And the report states that "the parks, groves and shore fronts were not assessed or taxed after the year 1881, and by vote of the directors were not included in the assets of the association." The parks also were designated by signs bearing their respective names, and

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seats therein were provided for the public, as well as at the shore front.

The record contains nothing to indicate that these positive statements have ever been modified or withdrawn and the lot owners and the general public are found to have known of these assurances and to have acted upon them.

It is unnecessary to enlarge further upon the report, as enough appears from the principal findings, to which sufficient reference has been made, to warrant the finding of a continuing purpose to dedicate, even if no formal vote to that effect was ever passed by the association. *Hobbs* v. *Lowell*, 19 Pick. 405, 409. *Noyes* v. *Ward*, 19 Conn. 250, 266. *Price* v. *Plainfield*, 11 Vroom, 608. *Wyman* v. *New York*, 11 Wend. 486. *Bartlett* v. *Bangor*, 67 Maine, 460. *Richardson* v. *Davis*, 91 Md. 390, 396. *Flershheim* v. *Baltimore*, 85 Md. 489. *Leggett* v. *Detroit*, 137 Mich. 247, 254. *Cincinnati* v. *White*, 6 Pet. 431. Dillon Mun. Corp. (5th ed.) § 1079 and cases cited in note 2.

The intention to dedicate being plain, and the material facts to which we have adverted being ample to constitute dedication, the scope of the decree is to be determined.

While it is probable that during the sixteen years elapsing since the proceedings were begun and the presentation of the case to the full court many and important changes have occurred, and the environment may have been more or less transformed, the rights of the parties must be ascertained and adjusted on the record before us. We assume that the present Attorney General still prosecutes and controls the suit and that the brief of counsel for the relators is submitted with his sanction. *Parker* v. *May*, 5 Cush. 336. *Attorney General* v. *Parker*, 126 Mass. 216, 221.

It not having been contended that the "Camp Ground," "Union Square" and "Pavilion Park," where the office and other buildings are and which have been occupied and used by the association for business and other purposes, should be considered as within the dedication, a decree with costs is to be entered overruling the exceptions and confirming the report and with the exception of the "Camp Ground," "Union Square" and "Pavilion Park" restraining and enjoining the association from obstructing, selling, conveying, leasing or otherwise disposing of

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any part of the parks, squares, groves, shore fronts and beaches, as shown on the plan, so as to interfere with the public use and easement.

Ordered accordingly.

NEWELL LYON, trustee, *vs.* GEORGE E. WALLACE & another.

Suffolk. March 18, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Fraud, As against creditors. *Husband and Wife. Evidence*, Of fraudulent intent, Presumptions and burden of proof, Failure to testify. *Bankruptcy.*

At common law (under St. 13 Eliz. c. 5) and apart from statutory provisions a preference of one creditor by paying or securing an honest debt to him to the exclusion of others is not unlawful or voidable by or in behalf of the other creditors, if the sole object of the payment or transfer is to pay or secure the debt.

In a suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy, on the ground that the transfer was in fraud of creditors at common law, *it seems* that the plaintiff may be permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present transaction was in fraud of creditors, because, although the plaintiffs in that action are strangers to the present plaintiff, the proof of the mutual fraudulent intent of the bankrupt and his wife at the time of the conveyance of the land is admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors.

In a suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy on the ground that the transfer was in fraud of creditors at common law, where a justice who heard the case found that the shares of stock were transferred to the bankrupt's wife in part payment of the amount of a legacy which her husband was bound to pay to her under a will of which he was the executor, that the bankrupt when he made the transfer knew that he was unable to meet the claims of his creditors as they became due, and that his wife "was aware of his intent to get the property where his creditors could not reach it," these findings do not establish any secret trust in relation to the property transferred to the bankrupt's wife in part payment of a legacy due to her, and the bill must be dismissed, because the plaintiff has failed to prove that the transfer was fraudulent against creditors at common law.

In the suit described above, the defendant, who was the wife of the bankrupt, did not testify in her own behalf and her husband was not called as a witness for

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her, but the wife had testified about the subject matter in a previous action at law, of which the record was introduced in evidence, and a stenographic report of her testimony in that case was read at this trial, and it was *said*, that under these conditions the inferences to be drawn against the defendant on account of the failure of herself and her husband to testify at the present trial were reduced to a minimum.

RUGG, C. J. This is a suit brought by the trustee in bankruptcy of George E. Wallace, to reach and apply certain stocks alleged to have been transferred by him, more than four months before the adjudication, to his wife in fraud of creditors at common law or under the St. 13 Eliz. c. 5. The case was tried before a single justice * of this court. He found that the transfer was made by George E. Wallace while to his own knowledge unable to meet the claims of his creditors as they became due. There was evidence tending to show that at the time of these transactions there was due and unpaid to the wife a legacy of $10,000 under the will of the father of George E. Wallace, of which the latter was executor. This evidence was uncontradicted and appears from the finding of the single justice to have been assumed by him to be true. It seems to us that this must be taken to be the fact in deciding the case. The finding was that as to George E. Wallace "the conveyance was fraudulent." The finding then proceeds as follows: "The next question is whether the wife shared in that fraud. At that time the other two legatees were getting their money and she has sworn that she thought she would get hers. On the whole, with some hesitation and taking into consideration the fact that neither she has testified here, nor has called her husband to testify, I find against her on that proposition, and find that she was aware of his intent to get the property where his creditors could not reach it. I therefore find and rule that on those findings the conveyance was fraudulent as against creditors." The case comes before us on the exceptions of the wife to the effect that this finding is not supported by the evidence.

The first point to be determined is the precise meaning of this finding. That best can be ascertained by a recurrence to the governing principles of law touching conveyances and transfers in fraud of creditors.

* *Hammond, J.*

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It is not a fraud at common law for a debtor who is in straightened circumstances to prefer one or more creditors, though such payment may render it impossible to pay anything to his other creditors. In the absence of any statute to the contrary, a debtor commits no fraud, (as was said by Chief Justice Bigelow in *Banfield* v. *Whipple*, 14 Allen, 13, at page 15,) "by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. Nor does it make any difference that both the creditor and debtor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtor's property by legal process in satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of a transfer of property is to pay or secure the payment of a debt, the transaction is a valid one at common law. The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal." This rule is well settled and has been reaffirmed frequently. *Giddings* v. *Sears*, 115 Mass. 505. *Carr* v. *Briggs*, 156 Mass. 78. *Sawyer* v. *Levy*, 162 Mass. 190. *Cohen* v. *Levy*, *ante*, 336.

The finding of the single justice does not quite go to the extent of bringing the wife within this rule. It falls just short of the essential facts to entitle the plaintiff to a decree in his favor. The finding is not in substance or effect that there was a secret trust or hidden advantage to the debtor arising out of the transaction. Something more is necessary than a simple knowledge on the creditor's part that the debtor did not intend that his other creditors should be paid, or even that he intended to put his property where his other creditors could not reach it. Such knowledge by the creditor of the purpose of the debtor, provided it is accompanied by a real payment in good faith of an actual debt, is no fraud at common law. The creditor, notwithstanding, may hold the payment of his debt made under such circumstances, apart from statute. On the findings of the single justice the plaintiff is not entitled to a decree in his favor. Before he can recover, it would be necessary that the finding should go further

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and establish that the transfer was not, as it purported to be, a simple payment of a real debt, but a transaction whereby some clandestine benefit was to accrue to the debtor.

The somewhat narrow finding of facts made by the single justice was warranted by the evidence. The crucial evidence upon which the finding concerning the wife was based was the transcript of testimony given by the wife upon the trial of another case where the issue of fraudulent conveyance between the husband and wife was involved, the record of the judgment in that cause and other documentary evidence, and the effect of the failure of both George E. Wallace and his wife to testify at this trial.

There was received in evidence against the exception of the defendant the record of a writ of entry in the Land Court, whereby it appeared that in an action by other creditors of George E. Wallace it had been found that a conveyance of certain land by him to his wife was in fraud of creditors. It was not the record of a case between the same parties. The plaintiffs there were strangers to the present plaintiff. But if the mutual intent of the husband and wife in making and receiving that conveyance were fraudulent, being within a few months of the transaction here under investigation, it had some tendency to establish a general fraudulent purpose to put the property of George E. Wallace out of the reach of his creditors, and was admissible on that ground. The defendants' exception to the admission of this evidence must be overruled. *Lynde* v. *McGregor*, 13 Allen, 172, 178. *Brownell* v. *Briggs*, 173 Mass. 529. *Commonwealth* v. *Farmer*, 218 Mass. 507, 512, 513.

No real doubt is thrown on the contention of the wife that there was due to her from an estate of which the husband was executor an unpaid legacy of $10,000, with its accrued interest. When other creditors began to press the husband and the possibility of a loss of fortune was imminent, it was not unnatural that this overdue legacy should be considered by him. While it would be difficult to obtain direct evidence of a secret trust reserved for the benefit of a husband out of the payment of a debt under such circumstances, — and its establishment commonly must rest upon inferences, — yet there hardly appears enough in this record to require a finding that the plaintiff has

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sustained the burden of proof which rests upon him of establishing that there was a secret trust and benefit reserved to the husband at the time of the transfer to the defendant. The single circumstance that neither the husband nor the wife were called to testify is not enough. That is ofttimes a factor of weight. *Howe* v. *Howe*, 199 Mass. 598. But in the case at bar the wife had testified about the subject matter in another hearing and a stenographic report of it was read at this trial. Under these conditions the inferences to be drawn from failure to testify are reduced to a minimium. *Buckley* v. *Boston Elevated Railway*, 215 Mass. 50, 56. The circumstance that the transaction was between husband and wife does not prevent it from being genuine and free from fraud. *Briggs* v. *Sanford*, 219 Mass. 572. *Hutchins* v. *Mead*, 220 Mass. 348. The finding of the single justice, in the respect that it does not go beyond a knowledge on the part of the wife of the intent of the husband to get the property where his creditors could not reach it, and falls short of establishing a secret trust in the property transferred to her in part payment of a legacy due her, is supported by the evidence.

But the further ruling of law that the conveyance was fraudulent against creditors was not warranted by the facts found, for reasons which already have been stated and on the authorities already cited. The motion that the bill should be dismissed ought to have been granted. The defendants' exception, therefore, must be sustained.

The finding of fact made by the single justice covers the decisive issue between the parties, and the record is in condition to warrant a final disposition of the case. Hence a decree may be entered dismissing the bill. St. 1913, c. 716, § 2.

So ordered.

H. Williams, Jr., (*E. E. Ginsburg* with him,) for the defendant Abbie W. Wallace.

A. Lincoln, (*E. O. Proctor* with him,) for the plaintiff.

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JAMES O. WINSTON & others *vs.* CITY OF PITTSFIELD & others.

Berkshire. March 22, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To set aside contract procured by misrepresentations, Fraud, Mistake, Remedy at law. *Contract*, Building contracts, Construction. *Damages*, Liquidated.

It here was *said* to be settled law that, where a contract to build a certain structure for an agreed compensation has been performed in full by the contractor, the fact that he has completed the work does not deprive him of the right to maintain a suit in equity to set aside the contract on the ground that he was induced to enter into it by fraudulent misrepresentations of the defendant or under mutual and material mistakes of fact and to recover the fair value of the labor and materials furnished by him to the defendant, if he brings his suit seasonably upon discovery of the fraud or mistake. In the present suit it was held upon demurrer that the bill contained no sufficient allegations of fraud or mistake to entitle the plaintiff to relief.

In a suit in equity by a contractor against a city to set aside a contract in writing, under which the plaintiff had constructed a reservoir for the defendant, on the ground that the plaintiff had been induced to enter into the contract by misrepresentations of the defendant, and to recover the fair value of the labor and materials furnished by the plaintiff in the construction of the reservoir, where it appears that in the proposal of the plaintiff, which was accepted by the defendant and was made a part of the contract, the plaintiff stated that he carefully had examined the location of the proposed work and the plans and specifications for the work and agreed that his proposal and such plans and specifications should be made a part of the contract, and where it appears that the estimates for the yardage of excavation made by the defendant's engineer and furnished to bidders were entitled "approximate quantities" and the schedule of items of the required masonry and materials was followed by the statement that the quantities were approximate only and were given as a basis for the uniform comparison of bids, the defendant reserving the right to increase or decrease the quantity of any class or portion of the work as might be deemed necessary by its engineer, the plaintiff states no ground for relief by alleging in his bill that in removing the soil for the reservoir site he was compelled to excavate more than double the number of cubic yards shown by the engineer's estimate and that in building the reservoir the different kinds of masonry and concrete blocks had to be furnished in greater and substituted quantities differing from the estimate.

Nor in such suit does the plaintiff state a ground for relief by alleging in his bill that a change of a diversion conduit from the location shown by the general plan to a "revised approximate location" required for its construction a different kind of material with a larger amount of excavation and masonry, if it appears from other allegations of the bill that the plaintiff's attention had

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been called to the change when the parties met to complete the contract and before its execution, although it is alleged that the defendant's engineer then said that the change in the line and grade would not involve additional expense, because, if the plaintiff chose to rely on the engineer's honest statement instead of acting on his own judgment, he must accept the consequences.

Equity will not give relief by setting aside a contract on the ground of mistake, where, although the plaintiff made a miscalculation when he signed the contract, the terms of the instrument express correctly the exact intention of the defendant.

Where by a contract in writing between a contractor and a city for the construction of a reservoir it is stipulated that "the time in which the various portions and the whole of this contract are to be performed and the work is to be completed is of the essence of this contract," and that the city may deduct the sum of $75 "for each and every calendar day beyond said time for the completion of the said work . . . until the said work shall be completed" "as liquidated damages, and in full compensation," in a suit by the contractor against the city to set aside the contract and recover the fair value of the labor and materials furnished, the amount of compensation to the city for eight months' delay to be deducted from the contract price under the above provision cannot be treated as a penalty or forfeiture, the parties having made a clear agreement that such amount shall be treated as liquidated damages.

In a suit in equity by a contractor against a city to set aside a contract in writing, under which the plaintiff had constructed a reservoir for the defendant, and recover the fair value of the labor and materials furnished by the plaintiff, an allegation in the bill that the defendant "has assessed" and deducted damages for moneys paid to engineers and inspectors and for pumping states no ground for relief, because, if such deduction was unauthorized, the remedy by an action at law is plain, efficient and exclusive.

BILL IN EQUITY, filed in the Superior Court on April 7, 1913, and amended by a substitute bill filed on January 31, 1914, by contractors doing business in the city of New York in the State of New York under the name of Winston and Company, against the city of Pittsfield, to set aside a certain contract in writing between the plaintiffs and the defendant, which had been performed by the plaintiffs, to construct a new reservoir for the waterworks of the defendant by building a masonry dam across Mill Brook and a diversion conduit to the reservoir from a tributary of Mill Brook and from several tributaries of Roaring Brook, alleging that the defendant, in inducing the plaintiffs to enter into the contract with it, "either intentionally perpetrated a fraud upon them by representing that the work to be done within the stipulated time was of a substantially less amount and of a substantially different character . . . than it intended to require of the complainants, and so to obtain more favorable prices than could have been obtained had the facts been fairly disclosed; or

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that said contract was entered into by the parties under a mutual mistake of fact and said contract is inequitable and unconscionable under the conditions herein disclosed;" and praying that an injunction might issue restraining the defendant from claiming any forfeiture of the contract on the part of the plaintiffs or from enforcing any penalty thereunder; that the bond accompanying the contract might be delivered up and cancelled; that an accounting might be taken between the plaintiffs and the defendant and that the defendant might be ordered to pay to the plaintiffs the fair value of the labor and materials furnished by them in the construction of the Farnham Reservoir with its accessories; the plaintiffs offering to return to the defendant, upon payment to them of the fair cost of the labor and materials, all sums of money which they had received on account of the work; and for further relief.

The allegations of the substitute bill are described in the opinion. The defendant demurred to the substitute bill, and the case was heard on the demurrer by *Wait*, J., who made an order sustaining the demurrer, from which the plaintiffs appealed. Later, by order of the same judge, a final decree was entered sustaining the demurrer and ordering that the bill be dismissed. The plaintiffs appealed.

C. F. Choate, Jr., for the plaintiffs.

W. R. Sears, (*S. L. Whipple* with him,) for the defendant.

BRALEY, J. The jurisdiction of a court of equity to decree appropriate relief, where it appears that a bilateral contract, whether it remains executory or has been fully performed by the plaintiff, has been entered into through the fraudulent representations of the defendant, or under mutual and material errors of fact, and the bill is seasonably brought upon discovery of the fraud or mistake, is well settled. *Long* v. *Athol*, 196 Mass. 497, 501. *J. P. Eustis Manuf. Co.* v. *Saco Brick Co.* 198 Mass. 212. *United Zinc Co.* v. *Harwood*, 216 Mass. 474, 477, 478. The question for decision is whether the plaintiffs' bill states a case within this doctrine.

The material statements admitted by the demurrer close with the allegations, that in inducing the plaintiffs to enter into the contract the defendant either intentionally perpetrated a fraud by representing that the work to be done within the stipulated time was substantially less in amount and of a substantially different

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character from the work it intended to require, and that this deception was practiced for the purpose of obtaining more favorable prices than could have been obtained if the facts had been fully disclosed, or that the contract, which is inequitable and unconscionable under the conditions averred, was entered into by the parties under a mutual mistake of fact.

The bill is brought after full performance to the satisfaction of the city, and upon their own showing the plaintiffs seemingly must have discovered during the progress of the work the alleged discrepancies between the requirements as understood by them and the construction of the contract asserted by the city, hereafter referred to as the defendant. The contract of course could not be concurrently valid and voidable. If upon being aware of the alleged fraud they chose to go on, their conduct would justify the defendant's contention that they affirmed the validity of the contract. *Plympton* v. *Dunn*, 148 Mass. 523. *Ginn* v. *Almy*, 212 Mass. 486, 493. But under the explanatory and charging allegations, that because of their gradual development they did not realize and appreciate the importance and effect of the differences or changes until after the work had been done and the final measurements ascertained, we shall consider the grounds upon which they rely for rescision in the order stated in the bill, even if in view of all the alternative and qualifying allegations it seems doubtful whether actual fraud has been charged.

The plaintiffs describe themselves as engaged in the business of general contractors, and as such they have entered into and performed contracts for the construction of railroads, waterworks, reservoir dams and other works of a public nature. It was in the light of this experience that they read the pamphlet entitled, "Information for Bidders," and the draft of "a proposed contract to be entered into by any successful bidder," furnished by the defendant when it decided to construct an additional dam and storage reservoir in connection with its system of water supply, and advertised for bids. We assume that the proposal submitted to the plaintiffs, who were successful bidders, followed the form shown by the exhibit annexed to the bill. It contains these significant words, "The undersigned, as bidder, declares that . . . he has carefully examined the location of the proposed work, the annexed proposed form of contract, and the plans and speci-

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fications therein referred to; and he proposes, and agrees if this proposal is accepted, that he will contract with said City . . ., in the form of the copy of the contract deposited in the office of the" city clerk. And the contract executed by the parties recites in the twenty-fifth article that all plans, general and detail, all specifications, the information for bidders and the proposal of the contractor, "are hereby made parts of this contract." If, as alleged, when full performance of the work as stipulated was demanded by the defendant, the plaintiffs in removing the soil for the reservoir site were compelled to excavate more than double the number of cubic yards shown by the engineer's estimate, and in building the dam the different classes of cyclopean masonry and concrete blocks had to be furnished in greater and substituted quantities differing from the estimate, the allegations that the estimates having been well considered represented substantially the amount and character of the work and materials required, which could not be exceeded by the defendant, cannot be sustained. The engineer's estimates for the yardage of the excavations appear in the information for bidders under the title of "approximate quantities." The schedule of items which includes the various classes of work, masonry and materials is followed by the statement that the quantities are approximate only, and are given as a basis for the uniform comparison of bids, while the city does not either expressly or by implication agree, that the actual amount of work or materials will correspond therewith, and the right is reserved to increase or decrease the quantity of any class or portion of the work as may be deemed necessary by the engineer. The plaintiffs without the schedule before them could not have bid intelligently. If they chose to read only a part, the defendant is not responsible for their inadvertence. If they read the whole, they acted with full knowledge of the conditions under which they were bidding, and the field was open to all competitors with no favors. The averment, that because of the frost and winter weather they were unable to examine thoroughly the physical conditions underlying the surface might have been a good reason for not bidding, although the defendant required bids to be submitted during the month of December, but it is not a reason for abrogating the contract into which they voluntarily entered.

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The last ground of avoidance is the change of the diversion conduit from the location shown by the general plan to a "Revised Approximate Location" requiring for its construction a different kind of material with a larger amount of excavation and masonry as averred in the eighteenth and twenty-first paragraphs of the bill. The plaintiffs' attention had been called to the change when the parties met to complete the contract, and before its execution. While the plaintiffs allege that the defendant "through its engineer thereunto duly authorized" represented that the change in the line and grade would not involve additional expense, it is not alleged that the representations were made for the purpose of misleading them. If as general contractors of wide knowledge and large ability they preferred to rely on the engineer's statements instead of acting on their own judgment, informed by the general plan, the conduit plan and profile, which were before them, where the outline of the revised and approximate location plainly appears showing the old line "along the edge of the upland" when they bid, and the increased length of the new line drawn "nearer the brook," and without further inquiry or examination executed the contract, they are not shown to have been overreached by the conduct of the defendant. The plaintiffs cannot shut their eyes to the facts and contend that they were misled or defrauded. *Mabardy* v. *McHugh*, 202 Mass. 148, 151, and cases cited. *King* v. *Eagle Mills*, 10 Allen, 548, 551. *Keene* v. *Demelman*, 172 Mass. 17.

It furthermore is not alleged that the engineer had authority to do away with the contract which the parties had met to execute, and, whether what was said by him amounted to a collateral contract binding on the defendant, is not before us. The bill seeks only to cancel the contract which the plaintiffs signed.

It is also apparent that the contract is not based on a material mistake shared by both parties as in *Long* v. *Athol*, 196 Mass. 497. To warrant the reformation of a written instrument for mistake the real intention of the parties must be clearly established. *German American Ins. Co.* v. *Davis*, 131 Mass. 316. *J. P. Eustis Manuf. Co.* v. *Saco Brick Co.* 198 Mass. 212, 218, 219. Nor can a party, who has the choice between two courses of action, and chooses one with the means of full knowledge before him to which his attention is called, have relief on the ground that

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he made a miscalculation. *Childs* v. *Stoddard*, 130 Mass. 110, 112. The contract as it left the hands of the plaintiffs expressed exactly the intention of the defendant and the terms under which it consented to become bound.

The work, however, not having been finished within the time specified in the sixth article, the twenty-sixth paragraph of the bill states that under the eighteenth article the defendant claims the right to deduct from the amount of the contract price remaining due "the sum of seventy-five dollars . . . for each and every calendar day beyond said time for the completion of the said work . . . until the said work shall be completed" "as liquidated damages, and in full compensation" for the delay covering a period of eight months. But the sixth article having stipulated that "the time in which the various portions and the whole of this contract are to be performed and the work is to be completed is of the essence of this contract," which has never been waived by the defendant, no relief on that ground can be decreed. The intention of the parties having been clearly expressed, the amount thus ascertained cannot under the circumstances be treated as in the nature of a penalty or forfeiture. *Wallis* v. *Carpenter*, 13 Allen, 19. *Cushing* v. *Drew*, 97 Mass. 445, 446. *Glynn* v. *Moran*, 174 Mass. 233. Story Eq. Jur. (13th ed.) §§ 1315–1320.

It further is alleged that the defendant also "has assessed" and deducted damages for moneys paid to engineers and inspectors and for pumping, but these allegations are insufficient to maintain the bill. The remedy by an action at law is plain, efficient and exclusive. *Holden* v. *Hoyt*, 134 Mass. 181, 185. *Fuller* v. *Percival*, 126 Mass. 381, 383.

We are accordingly of opinion that the contract cannot be cancelled and the plaintiffs be allowed to recover the fair value of the labor and materials, and the decree sustaining the demurrer and dismissing the bill should be affirmed with costs.

So ordered.

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THERESA GALLAGHER *vs.* MICHAEL P. MURPHY.

Suffolk. March 24, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Failure to light common hallway, Terms of oral letting shown by conduct. *Negligence*, Of one controlling real estate.

In an action against the proprietor of a tenement house by the mother of one of the defendant's tenants for personal injuries sustained by falling down a stairway after she had left the apartment of her son in the evening, there was evidence that whenever on previous occasions the plaintiff had left her son's apartment after dark a gas jet was lighted in the hallway, that on the occasion of the accident the light shone from the private hallway of her son's apartment into the common hallway and that the plaintiff did not notice that the hallway was otherwise unlighted until the door of the apartment closed behind her, when she stepped, as she supposed, upon a landing but in fact upon the stairway and fell. *Held*, that a finding was warranted that the plaintiff was in the exercise of due care. Following *Faxon* v. *Butler*, 206 Mass. 500.

It seems that, in the absence of any express or implied agreement or a statutory requirement, the proprietor of a tenement house, who is in control of the stairways and common passageways, is under no obligation to his tenants to light the hallways.

Where, in an action involving the duties of the proprietor of a tenement house toward one of his tenants, the contract of letting does not appear to have been in writing and there is no direct and positive evidence as to its terms, the conduct of the landlord and of the tenant, so far as the conduct of each was so open and notorious that it must have been known to the other, may be resorted to for the purpose of determining the terms of the tenancy according to the intention and contemplation of the parties.

In an action against the proprietor of a tenement house by the mother of one of the tenants, who sustained personal injuries by reason of the absence of light in a hallway under the control of the defendant, when the plaintiff, in leaving in the evening the lighted apartment of her son, had closed the door of the apartment behind her, if there is evidence which would warrant a finding that as a part of the contract of letting the apartment to the plaintiff's son the defendant had assumed the duty of seasonably lighting the gas in the common hallway on that floor and of maintaining the gas fixture in usable condition for this purpose and that on the evening of the accident he had failed in the performance of this duty, the question of the defendant's negligence is for the jury.

TORT for personal injuries sustained by the plaintiff on January 8, 1913, when she was leaving the apartment of her son on the third floor of the tenement house of the defendant numbered 9 on Ohio Street in Boston, by reason of the unsafe, dangerous,

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dark and insufficiently lighted condition of the hallways and stairways of that building, which were under the management and control of the defendant. Writ dated February 3, 1913.

In the Superior Court the case was tried before *Dana*, J., who at the close of the plaintiff's evidence, which is described in the opinion, ruled that on all the evidence the plaintiff was not entitled to go to the jury and ordered a verdict for the defendant. By agreement of the parties the judge reported the case for determination by this court, with the stipulation that, if the plaintiff was entitled to go to the jury, judgment should be entered for the plaintiff in the sum of $2,500; otherwise, judgment was to be entered for the defendant.

B. A. Brickley, for the plaintiff.

C. S. Knowles, for the defendant.

RUGG, C. J. The plaintiff according to her own testimony received, in a tenement house owned by the defendant, personal injuries under these circumstances: As she left the apartment of her son at about half past five o'clock on a January afternoon, the door opening into the common hallway closed behind her and thereupon she found herself in darkness while on the point of stepping in the usual way, as she supposed, upon a landing, but in fact at a stair, and she fell. She was familiar with the place. There was evidence that whenever she had left her son's apartment after dark on previous occasions, a gas jet was lighted in the hall. In this instance, the light shone from the private hallway of the apartment out into the common hall and she did not notice that it was otherwise unlighted until the door of the apartment closed behind her. While this testimony was somewhat shaken on cross examination, its substantial accuracy was for the jury. It was sufficient to support a finding that the plaintiff was in the exercise of due care. There are some differences between the facts here disclosed and those of *Faxon* v. *Butler*, 206 Mass. 500, but they are of unimportant details and not of essential factors. This case is governed by that on this point. See also *McLeod* v. *Rawson*, 215 Mass. 257.

The plaintiff as the guest of her son, the tenant of the defendant, is entitled to recover if she can show that she was injured by the negligence of his landlord. *Domenicis* v. *Fleisher*, 195 Mass. 281, 283.

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It is familiar law that a tenant commonly takes premises as he finds them, with no duty on the part of the landlord to look after their safety. But where the landlord retains in his possession and control the common halls and passageways, the law imposes a duty, which may rest wholly upon implication or may be defined and specified by the terms of the contract of letting, to keep them in the same condition as to safety in which they are or appear to be at the commencement of the tenancy. *Miles* v. *Janvrin*, 196 Mass. 431; *S. C.* 200 Mass. 514.

There is no obligation under ordinary circumstances, in the absence of express or implied agreement or statutory obligation, on a landlord to light common passageways. *Stone* v. *Lewis*, 215 Mass. 594. See Ann. Cas. 1914 D 592 note for further cases. Any duty in this respect in the case at bar must rest on contract. *Flanagan* v. *Welch*, 220 Mass. 186.

The contract of letting does not appear to have been in writing. There was no direct and positive evidence as to its terms. Therefore the conduct of the landlord and of the tenant, to the extent that it was so open and notorious as to speak the understanding of the parties and as to be likely to have come to the attention of the other and to be of such character as to call for some action on his part if he did not assent to the implications fairly arising from it, may be resorted to for the purpose of determining what were the terms of the tenancy according to the intentions and contemplation of the parties. *Fitzsimmons* v. *Hale*, 220 Mass. 461.

There was evidence which would support a finding that as a part of the contract of letting, the defendant as landlord agreed to light the common hallway on the floor of the tenement of the plaintiff's son. It was conceded that it was the duty of the defendant to cause the gas to be lighted on the first floor and to be turned off at about ten o'clock each evening by means of an apparatus in the basement. It appears also to have been the duty of the defendant to maintain in repair the gas fixtures in the common hallway on each floor. The point of doubt relates to the lighting of the gas on the third floor. There was testimony to the effect that from the beginning of the tenancy it was the custom of the janitor of the building, an employee of the defendant, to light or cause to be lighted the gas on that floor.

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Sometimes he would ask a "roomer" in the building to light the gas on that floor, at the same time giving him matches. The wife of the tenant testified that frequently she had complained about the hallway lights to the agent of the defendant, and that then the lights would be lighted all over the building, and that at the time of the accident no lights were lighted in any hallway, even on the first floor. There was also testimony that directly after the accident to the plaintiff, an attempt was made to light the gas on this floor and it could not be lighted. If this was the fact, it might have been found to be due to the failure on the part of the defendant's servant seasonably to turn the gas on to the supply pipe for this and the other gas jets at the common source in the basement or to some lack of repair in the gas fixture itself.

This body of testimony, together with the inferences which rationally might have been drawn from it, would support a finding that as a part of the contract of letting the tenement of the son, which the plaintiff was leaving at the time of her accident, the duty was assumed by the defendant as landlord that he would seasonably light the gas in the common hallway on the third floor and maintain the fixture in usable condition for this purpose, and that on the evening of the accident to the plaintiff the defendant negligently failed in the performance of this duty. The common hallway and the apparatus and fixtures for lighting it remained in the exclusive control of the landlord, and the tenant had only a right to enjoy the benefit of them. Under all the circumstances, although the case is close, it should have been submitted to the jury. *Marwedel* v. *Cook*, 154 Mass. 235. In accordance with the terms of the report, let the entry be

Judgment for the plaintiff for $2,500.

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EDMUND H. TALBOT & another, trustees, *vs.* MABEL M. MILLIKEN & others.

EDWARD W. HUTCHINS & another, trustees, *vs.* JULIA M. FAIRBANKS & others.

Suffolk. March 25, 26, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Capital and Income. Trust, Duties of trustee. *Corporation,* Dividend.

An accumulated surplus of undivided profits of a manufacturing corporation, which is distributed among its stockholders by means of a special dividend of $50 a share on shares of the par value of $100 each with the effect of diminishing substantially the present market value of the shares, is income and not capital, and a trustee, who holds such shares in trust to pay the income to certain persons for life with remainders over to others, should pay the whole of the dividend to the beneficiaries for life. Following *Hemenway* v. *Hemenway,* 181 Mass. 406, and *Gray* v. *Hemenway,* 206 Mass. 126.

RUGG, C. J. These are two bills in equity,* brought by trustees under the wills of Charles F. Fairbanks and of Julia M. Marsh respectively, praying for instructions whether under the terms of wills providing for payment of the net income of the trust funds to certain persons for life, with remainders over to others, a certain dividend of $50 per share received by them upon stock of the Bigelow Carpet Company is to be deemed income or capital.

Charles F. Fairbanks had been the treasurer and the active head of the Bigelow Carpet Company. Organized in 1899 with a capital of $4,030,000, the company had been very successful and for several years had a large surplus of undivided profits, which since January, 1907, had been in excess of $2,015,000 and which in 1914 amounted to about $4,000,000. After the death of Fairbanks in 1914, negotiations respecting the sale of not less than seventy-five per cent of the capital stock of the company were opened between a committee of the directors and two bank-

* These bills were filed in the Supreme Judicial Court on December 19, 1914, and the cases were reserved by *Crosby,* J., for determination by the full court.

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ing houses, which culminated in an oral offer of $225 per share, the par value of the shares being $100 each. Later it was suggested by some of the directors of the carpet company that, instead of a sale at $225 per share, the bankers should offer $175 per share after there had been declared in addition to a regular dividend of $3 per share a special dividend from the accumulated surplus or profits of $50 per share to be paid upon the acceptance of the offer by seventy-five per cent of the stockholders. A formal proposition to this effect was made by the bankers and submitted to the stockholders in a circular letter of the directors. The offer was accepted, and the special dividend was paid. Hence these bills.

The rule for determining the respective rights of those entitled to the income and to the principal of trust funds established long ago in this Commonwealth, and constantly followed, "is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." *Minot* v. *Paine*, 99 Mass. 101. It is a simple rule, comparatively easy in its application to ordinary cases. It has received illustrations in many instances involving a great variety of facts. *Lyman* v. *Pratt*, 183 Mass. 58. *Boston Safe Deposit & Trust Co.* v. *Adams*, 219 Mass. 175. The court always looks at the substance of the transaction rather than its form, and does not suffer itself to be trammelled by the names used. If in its essence the payment is one out of capital, then it is treated as such no matter how it may be denominated. But if in truth it is a payment of earnings, then it is deemed income. As was said in *D'Ooge* v. *Leeds*, 176 Mass. 558, "The simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or is of capital to be held as an investment in the corporation." It has been held that dividends in liquidation of a corporation are capital. *Gifford* v. *Thompson*, 115 Mass. 478. *Brownell* v. *Anthony*, 189 Mass. 442. Where the surplus or undivided profits already have been employed in the enlargement of the capital investment of the corporation and have become devoted to its physical plant, then a device to accomplish the transformation of such assets into stock obviously for the benefit of existing stockholders commonly will be treated as a stock and not a cash dividend. *Daland* v. *Williams*, 101 Mass. 571. *Rand* v. *Hubbell*, 115 Mass. 461, 474, 475.

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In the case at bar there was no liquidation of the corporation. Its stock apparently was bought by the bankers for the purpose of continuing a profitable, stable and established business through the same corporation. Undoubtedly the dividend was paid in fact out of an accumulated surplus of earnings, which had not been used in making additions to the permanent investment of the corporation in buildings or other estate to which capital usually is devoted. Doubtless if the special dividend had not been declared before the purchase of the stock by the bankers, they could have declared a like dividend after securing control of the management. If that had been done, any of the petitioners who had kept their stock could have been under no misapprehension as to the character of the dividend. The time of its declaration cannot make a difference in its nature. The dividend was actually paid in cash. It did not represent any part of the permanent capital of the corporation as in *Heard* v. *Eldredge*, 109 Mass. 258. The case is not complicated by a simultaneous issue of additional stock, which sometimes gives rise to questions of difficulty. *Davis* v. *Jackson*, 152 Mass. 58. *Gardiner* v. *Gardiner*, 212 Mass. 508. The special dividend in effect diminished the net assets of the corporation by the precise amount paid out, but did not affect the proportionate interest of each share of stock in that which was left. *Gray* v. *Hemenway*, 212 Mass. 239. The circumstance that in the vote declaring the special dividend, the payment is referred to as a distribution and not as a dividend, is of slight consequence. The substance of the matter was the declaration of a cash dividend. In its essential features the case is indistinguishable from *Hemenway* v. *Hemenway*, 181 Mass. 406, and *Gray* v. *Hemenway*, 206 Mass. 126.

The plaintiffs are to be instructed that this dividend should be treated as income and should be paid to the beneficiaries for life according to their respective interests.

So ordered.

F. Chase, for the plaintiffs, stated the case.

A. Marshall, for the remaindermen and also as guardian *ad litem*.

W. L. Van Kleeck, for the life beneficiaries, was not called upon.

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RALPH F. RUSSELL & another *vs.* JOSIAH BON.

Suffolk. March 26, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Mortgage, Of real estate: notice of foreclosure sale. *Notice.*

If the holder of a third mortgage of real estate in a notice of a sale in foreclosure of his mortgage states more than the facts recited in his mortgage as to the condition of the debts secured by the first and second mortgages and undertakes to make a statement as to the present amount due on either of those debts, he does so at his peril.

The holder of a third mortgage upon real estate which contained a statement that it was "subject to a first mortgage for $10,000, and a second mortgage upon which there now remains unpaid the sum of $3,350," in an advertisement of a sale in foreclosure of his mortgage stated, "Said premises will be sold . . . subject to said first mortgage for $10,000, to said second mortgage upon which there now remains unpaid the sum of $3,350 (the undersigned is informed that said second mortgage has been reduced by payments on account thereof)." At the time of the advertisement there was due but $1,100 on the second mortgage. The premises were sold at the foreclosure sale to the mortgagee. *Held*, that the sale was voidable by the owner of the equity of redemption, because the statement in the advertisement reasonably might have been understood to mean that the debt secured by the second mortgage had been more than $3,350 and had been reduced only to $3,350, and thereby possible purchasers might have been kept from the sale because of an apparent lack of an equity worth purchasing.

BILL IN EQUITY, filed on November 30, 1914, by the alleged owners of the equity of redemption in a parcel of land with the buildings thereon numbered 5 on Parkman Street in Boston to set aside a sale in foreclosure of a third mortgage on the property.

In the Superior Court the case was heard by *Fox*, J., who refused to make certain rulings asked for by the plaintiff, among them the eighth, which is quoted in the opinion, and ordered a decree that the bill be dismissed. The plaintiff alleged exceptions.

J. C. Johnston, for the plaintiff Russell.

Lee M. Friedman, for the defendant.

PIERCE, J. By the terms of the instrument of conveyance this, a third mortgage with a power of sale, was made "subject to a first mortgage for $10,000, and a second mortgage upon which there now remains unpaid the sum of $3,350."

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On September 17, 21 and 28, 1914, following an admitted default in the performance of a condition of the mortgage relating to the payment of the debt thereby secured, the mortgagee, by virtue of the power, advertised the sale of the mortgaged premises by public auction on the premises on October 10, 1914, at which time and place the sale was adjourned until October 13, 1914. On the last named day the premises were sold to the mortgagee.

The advertisement literally followed the description of the premises found in the mortgage, as also the provisions therein contained that the conveyance was "subject to a first mortgage for $10,000, and a second mortgage upon which there now remains unpaid the sum of $3,350." The advertisement continued: "Said premises will be sold, together with said rights in Seabury Place and subject to said first mortgage for $10,000, to said second mortgage upon which there now remains unpaid the sum of $3,350, (the undersigned is informed that said second mortgage has been reduced by payments on account thereof)." The parenthetical statement that the second mortgage had been reduced by payments on account thereof, when read with the statement in the mortgage deed and repeated in the advertisement of sale that "there remains now unpaid the sum of $3,350" reasonably might be interpreted by a not over critical reader fairly and reasonably to mean that the debt originally secured by the second mortgage was in excess of $3,350, and that by reason of payments there now remains unpaid the sum of $3,350. It also might mean, as it undoubtedly was intended by the mortgagee to be understood, that there was reason to believe that the second mortgage debt was something less than $3,350.

Before exercising the power of sale the mortgagee was held to strict observance of all express and implied conditions precedent contained in the mortgage or imposed by law. He was under no legal obligation to ascertain whether the first or second mortgage had been paid in whole or in part; much less was it his duty to make any statement in the advertisement of sale with reference thereto. It sufficed to state the facts as found in the instrument creating the power. Other statements he made at his peril.

There is no reason to suspect, much less to assert, an intent

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to mislead possible purchasers. Nevertheless such persons well may have been misled by the form of the advertisement to the belief that the second mortgage stood as security for a debt larger by $2,250 than it was in fact, and therefore, because they could see no possible equity, did not attend the sale. See *Way* v. *Dyer*, 176 Mass. 448.

The request numbered 8, "If it appears that the amount originally due upon the second mortgage had been substantially reduced, the notice of foreclosure setting forth that the premises were sold subject to a second mortgage upon which there now remains unpaid the sum of $3,350, without stating the amount of said balance with substantial accuracy, is insufficient and a foreclosure sale in accordance with the terms thereof is invalid, even though the notice contained the further statement that the mortgagee was informed that said second mortgage had been reduced by payments on account thereof," as applied to the facts of the case at bar should have been given in substance. *Model Lodging House Association* v. *Boston*, 114 Mass. 133, 139.

The exceptions should be sustained and a decree should be entered declaring the sale to be invalid and void.

Ordered accordingly.

ANDREW McARTHUR & others *vs.* HOOD RUBBER COMPANY & others.

Middlesex. March 31, 1915. — May 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To remove cloud upon title, Adequate remedy at law. *Superior Court. Land Court. Equity Pleading and Practice*, Decree. *Equitable Restrictions.*

The Superior Court is not deprived of its jurisdiction in equity to remove clouds upon titles by the provisions of St. 1904, c. 448, conferring exclusive and original jurisdiction upon the Land Court both in law and equity of petitions under R. L. c. 182, §§ 11–14, inclusive, to determine the validity of certain incumbrances; nor is the remedy granted by those sections so adequate and complete as to exclude general equity jurisdiction of the subject.

Where, in a suit in equity against a number of defendants, some of the defend-

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ants consent to the granting of the relief prayed for in the bill and the bill is taken *pro confesso* against all of the other defendants, while a final decree as prayed for may be entered against those consenting thereto, no such decree will be entered against those against whom the bill was taken *pro confesso* unless the facts alleged in the bill are sufficient to authorize such relief. In this case, a decree dismissing a bill under such circumstances was reversed on appeal and a decree in accordance with the prayers of the bill was ordered.

An equitable restriction, which was imposed on real estate by deeds made in accordance with a general plan for the benefit of a neighborhood, not only may cease to be enforceable in equity, as in *Jackson* v. *Stevenson*, 156 Mass. 496, by reason of a complete transformation of the character of the neighborhood, but also may cease to exist and become a mere cloud on the title to the land, removable by a decree in a suit in equity.

A suit in equity may be maintained by the owners of some of the lots shown on a plan of land, whereon all the lots were made subject to a restriction, contained in a deed in 1871 and then valid, that no building should be erected thereon "except dwelling houses as legitimately pertain thereto," to have the restriction declared no longer in force, where it appears that, although in 1871 the neighborhood was a choice residential district, at the time of the filing of the bill it had become wholly given over to manufacturing of an offensive character and to its attendant buildings, where large numbers of employees congregated, and that stores, shops, cheap lodging houses, tenement houses and boarding houses were the only valuable uses for the property, that the entire purpose for which the restriction had been imposed practically had ceased to exist and that for a long time it had been disregarded entirely and violated universally by nearly all, if not all of the owners of the land.

Upon the foregoing facts, there is not available to the plaintiffs either at common law or by statute such complete and adequate relief as will prevent them from invoking equitable remedies.

BILL IN EQUITY, filed in the Superior Court on June 15, 1914, and afterwards amended, by the owners of some of the lots of land designated on a recorded plan of "Norwood Park," so called, in Watertown, for the removal of an alleged cloud upon their title consisting of certain restrictions described in the opinion. The bill was against thirty-five defendants, alleged to be all of the owners of the other lots marked on the plan excepting such as had covenanted with the plaintiffs that the restrictions should be treated as having "come to an absolute end."

Twelve of the defendants assented in writing to a decree declaring the restrictions to be no longer in force. The bill was dismissed by consent and without prejudice as to the Hood Rubber Company. Against the remaining twenty-two defendants on motion of the plaintiffs the bill was taken *pro confesso*. After a hearing by *Jenney*, J., a final decree was entered that, as to the twelve defendants who consented thereto, the restrictions were no

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longer in force and that the title of the plaintiffs was no longer incumbered thereby. As to the twenty-two defendants against whom the bill was taken *pro confesso*, the bill was dismissed "for want of equity jurisdiction, but without prejudice as to the merits of said cause." The plaintiffs appealed.

The case was submitted on a brief by the plaintiffs.

G. R. Blinn & A. L. Taylor, for the plaintiffs.

RUGG, C. J. This is a suit in equity brought to remove a cloud from and to quiet and establish the title to certain real estate of the plaintiffs in Watertown.

1. The first question presented is whether the Superior Court has jurisdiction of a suit of this sort. Proceedings to quiet title and to remove clouds from titles constitute a well recognized branch of equity. *Clouston* v. *Shearer*, 99 Mass. 209. *Frost* v. *Spitley*, 121 U. S. 552, 556. By St. 1904, c. 448, exclusive and original jurisdiction was conferred on the Land Court both at law and in equity, among other matters, of "petitions to determine the validity of encumbrances under the provisions of sections eleven to fourteen, both inclusive, of" R. L. c. 182. That statute does not deprive the Superior Court of the power to remove in equity clouds upon titles. *First Congregational Society in East Longmeadow* v. *Metcalf*, 193 Mass. 288. That subject is touched upon in R. L. c. 182, §§ 6 to 10 both inclusive, and the jurisdiction in the Superior Court in that regard has not been disturbed. The subsequent sections, 11 to 14, "enable parties to obtain the construction of the court in regard to questions arising under written instruments and not to determine matters *in pais*. See *Arnold* v. *Reed*, 162 Mass. 438; *Blanchard* v. *Lowell*, 177 Mass. 501." *Crocker* v. *Cotting*, 181 Mass. 146, 153. The remedy afforded by these sections is not so comprehensive, adequate and complete as to exclude general equitable jurisdiction. R. L. c. 182, §§ 1 to 4, which confer power to order a party in proper instances to bring an action at law to try his title, has not limited the general authority of courts of equity. *Smith* v. *Smith*, 150 Mass. 73.

2. Some of the defendants have appeared and consented to the entry of a decree in favor of the plaintiffs. As to these, no further question now is raised. The bill, has been taken for confessed against numerous other defendants. The truth of the

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facts pleaded is thereby established. *Mayberry* v. *Sprague*, 207 Mass. 508, 512. But the allegations of the bill, even after having been taken for confessed, must be sufficient to authorize relief before a decree can be entered as against them in favor of the plaintiffs. *Russell* v. *Lathrop*, 122 Mass. 300.

3. The substance of these allegations is that, in a deed of this estate in 1871 from the town of Watertown was the clause, "this conveyance is made subject to restriction that no building shall be erected on either of said lots, except dwelling houses as legitimately pertain thereto;" that although at that time the neighborhood was a choice residential district, it has now become wholly given over to manufacturing of an offensive character and to its attendant buildings, where large numbers of employees congregate, and stores, shops, cheap lodging houses, tenement houses and boarding houses are the only valuable uses for the property, and it is unfit for residential purposes: that because of these and other such like matters, "the character of all the property . . . upon which said restriction was imposed has entirely changed; that the entire purposes for which said restriction was imposed have come to an absolute end; that said restriction has been for a long time entirely disregarded and universally violated by nearly all, if not all, the present owners of the lands," and that it would be oppressive to undertake to enforce the restriction and would render of little or no value the petitioners' estate.

4. No question is made as to the initial validity of the restriction. The contention is that it not only has become unenforceable in equity by reason of changed conditions, under the doctrine of *Jackson* v. *Stevenson*, 156 Mass. 496, but also has been extinguished thereby. It is plain that under the allegations of the bill no one of the defendants could obtain relief in equity for the enforcement of the restriction against the plaintiffs. Nor could any of them maintain an action at law against the plaintiffs for violation of the restriction except possibly for nominal damages, and even this is not certain. Moreover, it would not be for the interests of any of the defendants to assert that the land is still subject to the restriction. It is not averred that the plaintiffs have violated the restriction nor that its enforcement has been threatened by any of the defendants.

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The facts set out in the bill show that as to these defendants the restriction has come to an end. This is the fair import of the allegations, although there is no categorical statement to that effect. The change in the character of the neighborhood is so radical that it seems plain that there can be no further life in the restriction. There are no facts which show that even as to the estate of any one of the defendants the removal of the restriction on the plaintiffs' land would be of any significance. The situation in legal intendment is like that disclosed in *Bangs* v. *Potter*, 135 Mass. 245, and *Central Wharf* v. *India Wharf*, 123 Mass. 567. Manifestly the facts are not such as to warrant the inference that any of the defendants would suffer any substantial damage by a legal adjudication that the restriction has ended. The facts alleged in the bill show an even more fundamental transformation of the neighborhood than in *Jackson* v. *Stevenson*, 156 Mass. 496.

5. The principle on which jurisdiction is founded to remove a cloud upon a title is, as substantially was stated in *Martin* v. *Graves*, 5 Allen, 601, 602, that whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest and he cannot immediately protect or maintain his right fully and completely by proceedings at law, then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties. *Clouston* v. *Shearer*, 99 Mass. 209.

The restriction in the case at bar throws a cloud upon the title of the plaintiffs. When the purpose for which the restriction was imposed has come to an end, and where the use of the tract of land for whose benefit it was established has so utterly changed that no party to the bill could be heard to enforce it in equity or would suffer any damage by its violation, and where a large number of different owners are affected on the record by the restriction and are joined in one proceeding, a proper case is made out for equitable relief. It is not essential under such circumstances that the evidence to establish the facts is likely to become lost or unavailable, although that circumstance sometimes exists and is adverted to. The cloud exists regardless of the nature of the evidence by which its true character may be established. Moreover, the evidence as to the exact character of

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this neighborhood in 1871, when the restriction was established manifestly will become increasingly difficult to obtain and present to a court with the force and distinctness now available. The prevention by equitable proceedings of the continuance of a restriction which has ceased to have any vital force and which constitutes only a cloud, stands in principle upon the same basis as the prevention of a cloud from coming into being. This is a well recognized ground for relief in equity. *O'Hare* v. *Downing*, 130 Mass. 16. *Rogers* v. *Nichols*, 186 Mass. 440.

6. There was not available to the plaintiffs such complete and adequate relief at law as to prevent them from invoking equitable remedies. It is doubtful whether the power to register titles conferred upon the Land Court by R. L. c. 128, § 39 and acts in amendment thereof, went to the extent of authorizing the removal of a cloud of this nature from an owner's title as a part of a petition to register title. The enactment of St. 1915, c. 112, conferring ample powers in this respect, with detailed directions as to its exercise, is some indication of a legislative interpretation as to the scope of the earlier statutes. But if it be assumed without so deciding, that such jurisdiction existed in the Land Court, the relief there afforded would be coupled with such other matters and proceedings that it hardly could be deemed the equivalent in plainness, completeness and adequacy of a proceeding in equity to remove a cloud upon a title, and would not exclude the equitable remedy. See *Hinchley* v. *Greany*, 118 Mass. 595, 598; *Enfield* v. *Wood*, 212 Mass. 547.

It scarcely needs to be added that this adjudication binds only the parties hereto and can have no effect upon others, if any there are, who have an interest in the restriction. The decree is to be reversed and a new decree may be entered in favor of the plaintiffs declaring the restriction at an end so far as concerns these defendants, without costs.

So ordered.

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WALTER A. LAMBERT, administrator with the will annexed, *vs.* BERTHA R. M. CHENEY.

Suffolk. March 5, 1915.—May 25, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Practice, Civil, New trial. *Probate Court,* Appeal. *Supreme Judicial Court.*

A motion for a new trial of issues, which were framed by the Supreme Judicial Court on an appeal from a decree of a Probate Court allowing a will and were sent to the Superior Court for trial, can be made only in the Superior Court, where the issues were tried.

Motions for new trials of issues framed upon appeals from decrees of the Probate Court are governed by the same rules as are motions for new trials in actions at common law.

In this Commonwealth the findings of a jury upon issues of fact framed upon an appeal from a decree of a Probate Court, if not set aside by this court for an error of law or by the court in which the issues are tried on a motion for a new trial, are conclusive upon the parties and their privies.

CARROLL, J. This is an appeal from a decree of the Probate Court for Suffolk County allowing the will of Mamie E. Mawson, late of Boston. In the Supreme Judicial Court, on motion of the appellant, issues were framed and the case was sent to the Superior Court, where it was brought before a jury * who, on October 14, 1914, found that the will was properly executed, that the testatrix was of sound mind, and that no fraud or undue influence was practiced upon her.

Exceptions were not filed within the time required by law, R. L. c. 173, § 106, but the time for filing was extended to and including November 23, 1914, on which day the exceptions of the appellant were filed; but no notice of the filing was given to the appellee until the next day, November 24, 1914. *De Bang* v. *Scripture,* 168 Mass. 91. On November 25, 1914, the appellant filed a motion requesting an extension of time for the giving of notice of the filing of her exceptions and requesting the court, in the event of the dismissal of her exceptions, to report the case to the full court; and on the same day the appellee filed

* The case was tried in the Superior Court before *Brown,* J.

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a motion in the Superior Court, asking that the exceptions be dismissed because of the failure to give the notice within the proper time. *Hack* v. *Nason*, 190 Mass. 346.

On December 8, 1914, after a hearing, the judge of the Superior Court denied the motion of the appellant for an extension of time, allowed the motion of the appellee to dismiss the exceptions and refused to report the case to the full court. The appellant's exceptions were accordingly dismissed. No appeal from or exception to this decision was taken in the Superior Court. On December 29, 1914, the clerk of that court returned the papers to this court, with his certificate of the proceedings in the Superior Court. At the hearing in the Supreme Judicial Court * upon a motion to enter a final decree, the appellant objected, and for the first time presented her motion for a rehearing, asking that the findings upon the second and third issues be set aside and a new trial be granted on those issues, either in this court or in the Superior Court, because the judge excluded evidence offered by her, refused instructions requested by her, and gave instructions inconsistent with those she had requested. This motion was denied, and interlocutory and final decrees were ordered to be entered.

The motion of the appellant before a justice of the Supreme Judicial Court, at the hearing to enter the proper decrees in the case, was in effect a motion for a new trial. Such a motion must be made in the court where the case is tried. R. L. c. 173, § 112. *Coffing* v. *Dodge*, 169 Mass. 459. *Manzigian* v. *Boyajian*, 183 Mass. 125. Motions for new trials in probate appeals are governed by the same rules as in suits at common law. *Perry* v. *Shedd*, 159 Mass. 200.

But the appellant maintains that the verdict of a jury in a probate appeal is merely to inform the conscience of the court, and that the judge may adopt or disregard it; that the verdict in such a case being advisory, it is not conclusive, as in an action at law, and the court ordering the decree may enter such a decree as it thinks proper, notwithstanding the verdict of the jury. And this is the practice in a number of jurisdictions. See Fletcher, Eq. Pl. & Pr. 631, *et seq.*; but in this Commonwealth the prac-

* By *Pierce*, J.

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tice has been directly to the contrary. The verdict of a jury at common law or in a probate appeal is conclusive and is looked upon as establishing all the facts, unless, within the discretion of the trial judge, the verdict is set aside. *Crocker* v. *Crocker*, 188 Mass. 16. And on appeal to this court, we cannot set aside the verdict of a jury on issues properly submitted to them and heard in another tribunal. *Crocker* v. *Crocker*, *supra*. See also *Newburyport Institution for Savings* v. *Coffin*, 189 Mass. 74. When the case came before a single justice of this court, he, as matter of law, properly refused the motion of the appellant and ordered the decrees to be entered.

Decree affirmed.

G. P. Bryant, for the appellant.
F. Burke, for the appellee.

BOSTON AND MAINE RAILROAD *vs.* JAYME M. D'ALMEIDA, administrator, & others.

Middlesex. March 17, 1915. — May 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To enjoin enforcement of execution. *Execution*. *Joint Tortfeasors*.

If, after the trial together of separate actions, one by an administrator against the employer of his intestate for the intestate's conscious suffering and death and the other against a railroad company for causing the death of the intestate, verdicts are rendered, judgments are entered and executions are issued for the plaintiff in both actions, the judgment in the action against the railroad company being for the larger amount, and the execution against the employer is paid in full and that against the railroad company is returned to court with an indorsement thereon stating the payment of a part of the amount by the railroad company and the payment of the other execution; and if thereafter an alias execution is issued for the balance still unpaid of the execution against the railroad company when by reason of the circumstances as a matter of law no further execution should have issued, the railroad company cannot maintain a suit in equity to enjoin the enforcement of the alias execution, but its remedy is to bring forward the original action against it and to move to set aside the alias execution for irregularity.

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BILL IN EQUITY, filed in the Superior Court on January 26, 1915, seeking to enjoin the defendant administrator from enforcing an alias execution issued against the plaintiff under the circumstances described in the opinion.

The defendant demurred to the bill for want of equity. The demurrer was heard by *Brown*, J., and was sustained, and a decree was entered dismissing the bill with costs. The plaintiff appealed.

F. N. Wier, (*J. M. O'Donoghue* with him,) for the plaintiff.

S. E. Qua, (*F. W. Qua* with him,) for the defendants.

LORING, J. This is an appeal from a final decree dismissing a bill of complaint brought by the Boston and Maine Railroad to enjoin Jayme M. D'Almeida and his attorneys from enforcing an alias execution for the uncollected balance of a judgment in favor of D'Almeida, entered on the verdict for $6,300 recovered by him in *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81.

It appears from the bill of complaint that after the rescript sent by this court pursuant to the opinion in *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81, the plaintiff in that case received $3,671.08 from the Boott Mills apart from the fees of the deputy sheriff; that he indorsed upon the execution taken out in *D'Almeida* v. *Boston & Maine Railroad* that he had received from that defendant $3,092.49. The plaintiff's attorneys made this further indorsement on that execution: "Having received from the Boott Mills the full amount of the judgment against it in No. 17649, Jayme M. d'Almeida, adm'r vs. Boott Mills, and being of opinion that, in view of the opinion of the Supreme Judicial Court in these cases, we are not authorized to proceed further in the collection of this execution, we hereby return the same to Court." Doubtless this action of the plaintiff's attorneys was taken by reason of the statement in *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81, 87, that the plaintiff "could have but one satisfaction in damages."

On November 13, 1914, the plaintiff's attorneys in the original action of *D'Almeida* v. *Boston & Maine Railroad* took out an alias execution and it is alleged in the bill of complaint now before us that they intend to collect under this alias execution the unpaid balance of the judgment entered on the verdict for $6,300 in the case of *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81. We assume that this alias execution was taken out in consequence

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of the statement in *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582, 592, namely, that whether there could be more than one satisfaction in damages was not before the court for decision in *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81, and that if the statement that there could be but one satisfaction in damages is inconsistent with the reasoning of the opinion in the later case, "to that extent it is not followed."

The bill now before us is based on two grounds: First, on the ground that the statement in *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81, 87, (namely, that there could be "but one satisfaction in damages,") was correct; and secondly, on the ground that whether it be correct or not, the original case of *D'Almeida* v. *Boston & Maine Railroad* was tried together with the case against the Boott Mills on the basis that there could be but one satisfaction in damages, and that the attorneys for D'Almeida assented to that proposition and argued that to the jury in connection with the amount of the penalties which they should find had been incurred by the two defendants, namely, the Boston and Maine Railroad and the Boott Mills.

One of the grounds on which the defendant has insisted that the decree dismissing the plaintiff's bill was correct is that the remedy of the Boston and Maine Railroad, even if it is correct in its contentions stated above or in either of them, is not by a separate bill in equity. In that connection the defendant relies on *Fuller* v. *Cadwell*, 6 Allen, 503, *McBride* v. *Little*, 115 Mass. 308, 310, *Spaulding* v. *Backus*, 122 Mass. 553, 554, *Payson* v. *Lamson*, 134 Mass. 593, 599, *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299, 302, *Amherst College* v. *Allen*, 165 Mass. 178.

Where a party threatens to seize under an execution land which is not subject to be seized under the execution, a bill in equity can be maintained to prevent a cloud being created upon the title to that land. That was the case in the two decisions relied upon by the plaintiff, *O'Hare* v. *Downing*, 130 Mass. 16, and *Stevens* v. *Mulligan*, 167 Mass. 84. In those cases there was no question as to the executions having been properly issued. The objection in each of those cases was that the party taking it out was undertaking to use it in a way in which he had no right to use it, and in a way which would create a cloud on the plaintiff's title to his land. That is a matter which the court issuing the execution

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could not deal with, and constituted ground for relief in a court of equity. But in the case at bar the question is not the question of an improper use of an execution properly issued. The question in the case at bar is whether under the circumstances stated in the bill of complaint an alias execution ought to issue at all. That is a question for the court in which the judgment was rendered on which the alias execution is or is not to issue. That question is a question of law to be determined by the court of law which issues the execution. There is no ground (in such a case) for interference by an independent court of equity. We say that there is no ground for interference by an independent court of equity because if this bill in equity is well brought in the Superior Court it would have been well brought in the Supreme Judicial Court.

In the case at bar the execution has in fact issued. If the Boston and Maine Railroad is correct in its contention that no alias execution ought to issue under the circumstances stated in the bill of complaint now before us, its remedy is to file a motion to bring forward the original action (in which the judgment was rendered on which the alias execution in question has been issued) and to move to set aside for irregularity the execution which in fact has been issued. Of the right of the court to entertain such a motion there can be no question. See for example Barker, J., in *Chesebro* v. *Barme*, 163 Mass. 79, 81, where he says: "The general principle is, that, when the judgment is recovered in a court having jurisdiction, and the execution is issued by the proper officer, irregularities, either in the mode of issuing it or in the document itself do not make it void; and that it may be dealt with by the court upon motion of either party, and amended or annulled as justice may require." To the same effect see 2 Tidd's Pract. (4th ed.) 1032, 489, 513, 994 and 1145.

All the matters which are made the basis of this bill in equity are matters which could be made the foundation of a motion by the Boston and Maine Railroad to set aside the execution against it which has been taken out by the attorneys for D'Almeida.

We do not see how this separate suit in equity can be amended into a motion in the original action at law. The decree dismissing the bill should be without prejudice; and so modified it should be affirmed. It is

So ordered.

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COLLECTOR OF TAXES OF BOSTON *vs.* NEW ENGLAND TRUST COMPANY.

COLLECTOR OF TAXES OF COHASSET *vs.* SAME.

Suffolk. Norfolk. March 23, 1915. — May 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Assignment, For benefit of creditors. *Tax*, Assessment. *Words*, "Business," "Place of business."

An instrument of trust provided that, because of the pendency in the United States Supreme Court of two suits in which no supersedeas bonds had been given, "and for other reasons," the grantor sold and conveyed to the trustee all of his property, excepting real estate in Massachusetts exempt from being taken on execution and certain leasehold and other interests which the trustee might think it undesirable to accept and a power of appointment given the grantor under his father's will, and gave to the trustee full power to hold the property, to sell it when in his discretion it was good business judgment to do so to fulfil certain business obligations of the creditor, and, at the termination of the pending litigation, to convert the property into cash and to distribute it substantially in accordance with the provisions of the national bankruptcy act to such creditors as assented to the provisions of the trust, paying the balance, if any, to the grantor. There also were provisions that, in case of bankruptcy proceedings within four months, the trustee should surrender the property to the trustee to be appointed therein, that creditors might assent to the terms within sixty days and that, upon their assenting, they agreed not to prosecute by suit or action any claim against the grantor. All the creditors of the maker, including the plaintiff in the two suits in the United States Supreme Court, signed their assent to the instrument. Their claims amounted to about $2,183,000. The property transferred to the trustee amounted to about $1,900,000. *Held*, that the instrument was an assignment for the benefit of creditors and was not a mortgage or pledge.

Neither the validity nor the character of an assignment for the benefit of creditors is affected by a failure to record it in accordance with the requirements of R. L. c. 147, §§ 21, 22.

Where one who, previous to March, 1910, had been an organizer of and officer in many corporations and had maintained a suite of offices in Boston while residing in Cohasset, at that time made an assignment for the benefit of his creditors, severed his connection with many of the corporations but continued to be president of two of the smaller ones and transacted business in regard to them in an office in Boston, kept his own name on the door of the office, in the directory of the building where the office was and in the telephone directory, attended to business for his wife in that office, paid a part of the rent of the office, had a private secretary whose salary was paid by his wife and came to the office once a week and there transacted all the business that he had to

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transact, there being "no changes in the conditions" for three years after the assignment from what they were before except that the assignor became less active than before, it was *held*, that the assignor had a place of business within the meaning of St. 1909, c. 490, Part I, § 23, cl. 8, which determined where the property in the hands of the assignee should be assessed for taxation, and that such place of business was Boston.

CARROLL, J. These two actions are brought, one by the tax collector of the city of Boston and one by the tax collector of the town of Cohasset, to recover a tax assessed by the assessors of the respective municipalities as of April 1, 1913, on certain personal property held by the defendant under an indenture of trust, dated March 18, 1910, given by Albert S. Bigelow, a resident of Cohasset, under which instrument the defendant has been acting continuously from the time of the delivery to it of such property on some date between March 18, 1910, and April 15, 1910, to the time of the trial in the Superior Court. The question involved is whether the personal property in the possession of the defendant trust company under the indenture was taxable by the city of Boston or by the town of Cohasset on April 1, 1913.

The issues raised by the pleadings and at the hearing * were

"(1) Whether said indenture was an assignment for the benefit of creditors within St. 1909, c. 490, Part I, § 23, cl. 8.

"(2) If said indenture was an assignment within said statute, then whether the controlling date to which the inquiry as to the principal place of business of the assignor relates, is the date of said assignment or April 1, 1913, the date on which the liability of said property to tax for the year 1913 attached; and

"(3) Whether said Albert S. Bigelow had his principal place of business in Boston within the meaning of said statute on the date which the court shall deem controlling."

The St. of 1909, c. 490, Part I, § 23, cl. 8, is as follows:

"Eighth, Personal property taxable as such, held in trust by assignees under the insolvent law or under any bankrupt law or any voluntary assignment for the benefit of creditors, shall be assessed to such assignees in the place where the insolvent, bankrupt or assignor had his principal place of business, if any; otherwise in the place of his residence."

* By *Morton*, J., without a jury, who found for the plaintiff in the first action in the sum of $26,123.36, and for the defendant in the second action.

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1. The deed of trust was dated March 18, 1910, and was between Albert S. Bigelow, as maker, The New England Trust Company, as trustee, and the corporations, firms and individuals who became parties thereto as beneficiaries. It provided that, whereas two suits, brought against the maker by the Old Dominion Copper Mining and Smelting Company, had gone to final decrees in the Supreme Judicial Court of Massachusetts, and the two writs of error issued therein had been entered in the Supreme Court of the United States, and in such writs no supersedeas bonds had been given, "therefore, and for other reasons, this Indenture of Trust is made advisable."

It purported to sell and assign to the trustee all of the property and estate of the maker, except property in Massachusetts which would be exempt from attachment or from being taken on execution, and excepting leaseholds, or other interests, which the trustee might deem it undesirable to accept, and also excepting the power of appointment given to the maker by the will of his father.

The value of the assets which passed to the trustee under the indenture was approximately $1,938,183.72. The sum awarded by the decrees in the two suits of the Old Dominion Copper Mining and Smelting Company was $2,182,839.46, and the claims of the other creditors approximated $165,500. All of Bigelow's creditors, including the Old Dominion Copper Mining and Smelting Company, assented to the assignment.

The deed gave to the trustee full power to hold the property, with the right to sell the same when, in the opinion of the trustee, it was good business judgment so to do, to carry out the maker's obligations under certain underwriting agreements, and, at the termination of the pending litigation above referred to, to convert the property into cash and distribute it to the assenting creditors substantially in accordance with the provisions of the bankruptcy act, the remainder, if any, to be paid to the assignor, no distribution being authorized until all proceedings under the litigation were terminated, final judgments or decrees entered against the maker; the creditors agreeing not to bring or prosecute any suit or action against the maker or the trustee on account of any existing claim against the maker.

It also provided, in case of bankruptcy proceedings within four

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months from its date, that the trustee thereunder was to surrender the property to the trustee in bankruptcy, and that all creditors might become parties thereto by signifying their assent within sixty days.

There were also many other sections in the agreement providing for the rights of the respective parties.

"Assignments for the benefit of creditors are transfers . . . by debtors, of some or all of their property to an assignee or assignees, in trust to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor." Burrill on Assignments, c. 1, § 2.

Considering all the stipulations and the whole purpose of the instrument, we are satisfied that it was intended between the parties to be and was under the St. of 1909 for purposes of taxation an assignment for the benefit of creditors, and it was not, as argued by the plaintiff, the collector for the town of Cohasset, a transaction in the nature of a mortgage or pledge. By its terms it transferred to the assignee, as trustee, for the benefit of the maker's creditors, the control, ownership and title of all the maker's property and estate, and the possession of the same was delivered to the trustee for the purposes of the trust.

Such a conveyance is different from a pledge, or from an instrument by which property is held merely as security or a mortgage where the title passes "defeasible on the performance of a condition subsequent." *Weeks* v. *Baker*, 152 Mass. 20. *Harding* v. *Eldridge*, 186 Mass. 39, 41.

Nor is the deed any less an assignment for the benefit of creditors, at least for purposes of taxation, under the statute above referred to, because it is provided in the deed that no distribution thereunder shall be authorized until the litigation between the maker and the Old Dominion Copper Mining and Smelting Company "shall be finally completed and final judgments or decrees entered against the Maker."

The collector for the town of Cohasset also insists that because the instrument was not recorded and notice was not given to creditors under R. L. c. 147, §§ 21, 22, it is not an assignment for the benefit of the creditors.

This statute does not affect the validity of the deed of assign-

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ment, nor does it cease to be an assignment for the benefit of creditors because the statute was not complied with. The failure to comply with these sections of the statute simply takes away from the assignee certain protection therein given him in the event of subsequent insolvency. See *Hoague* v. *Cumner*, 187 Mass. 296.

2. The St. of 1909, c. 490, Part I, § 23, cl. 8, provides that personal property held under an assignment for the benefit of creditors shall be assessed to the assignee in the place where the assignor had his principal place of business, if any; otherwise in the place of his residence.

"Business" is "anything which occupies the time and attention and labour of a man for the purpose of profit. . . . It is a word of extensive use and indefinite signification." Jessel, M. R., in *Smith* v. *Anderson*, 15 Ch. D. 247, at page 258. And a person has a place of business where he "has an office or known or settled place of business for the transaction of his monied concerns." *Sussex Bank* v. *Baldwin*, 2 Harrison, 487, 488. A person may have a place of business which is not exclusively his own, when he is allowed to occupy the office of another where he receives business calls and directs them to be made. *West* v. *Brown*, 6 Ohio St. 542.

Albert S. Bigelow was a resident of Cohasset and had no place of business, either at the date of the assignment or in April, 1913, unless he had such a place of business in Boston. There was much evidence before the court bearing on the question, and it was found that Albert S. Bigelow had a place of business in the city of Boston on March 18, 1910, and also on April 1, 1913.

Briefly stated, the evidence shows that for many years before the date of the assignment Mr. Bigelow had a suite of offices, consisting of five rooms in the Sears Building in Boston. He had organized many corporations and was an officer in many of them; he transacted practically all of the business of these corporations as well as his own personal and financial business in these offices. In the summer of 1909 he severed his connection with many of the corporations, but continued to be president of two of the smaller companies and continued to conduct his business at this place. He came to his office regularly, except when he

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took a vacation, and this continued to the time of the assignment. Mr. Bigelow paid from the offices the expenses of a mining property in which he was interested. His name was on the door, it appeared in the building directory and in the telephone book; and to April 1, 1913, he still occupied these offices. He remained an officer of one or two corporations and continued to look after the business of Mrs. Bigelow; he had a desk in one room and a private desk and safe in another room; a portion of the rent was charged to him; he had a private secretary in the office, paid by Mrs. Bigelow; he there transacted all the business he had to do, consulted with his attorneys, had business dealings with the attorneys of the defendant trust company, bought, sold and managed the property of Mrs. Bigelow, received correspondence in connection with his personal and financial affairs, interviewed people there in reference to business, and, as stated by his secretary, "there were no changes in the conditions between March, 1910, and April, 1913, except that after the summer of 1909, Mr. Bigelow ceased to manage the majority of said corporations, and again after the assignment, Mr. Bigelow did less than before."

We think, under these circumstances, Mr. Bigelow had a place of business in Boston in March, 1910, when the assignment was executed; that he continued to have a place of business in Boston up to and including April 1, 1913, and therefore the tax assessed as of April 1, 1913, by the assessors of the city of Boston upon the personal property held by the New England Trust Company as assignee under the assignment for the benefit of the creditors of Albert S. Bigelow, was assessed legally; and the presiding justice was fully justified in so finding. There is nothing in the case of *Hanley* v. *Eastern Steamship Corp. ante*, 125, which conflicts with what is here decided.

In view of what we have said it becomes unnecessary to consider the second question, that is to say, whether the controlling date was the date of the assignment, or April 1, 1913.

In accordance with the terms of the report, in the first case, to wit, *Collector of Taxes of Boston* v. *New England Trust Co.*, judgment is to be entered for the plaintiff in the sum of $26,123.36, with interest from November 1, 1913; and in the second case, *Col-*

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lector of Taxes of Cohasset v. *New England Trust Co.*, judgment is to be entered for the defendant.

So ordered.

J. P. Lyons, for the plaintiff in the first case, was not called upon.

A. P. Worthen, for the plaintiff in the second case.

B. E. Eames, for the defendant.

FREDERICK BLOHM *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 16, 1915. — May 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability.

In an action by a painter, against a corporation employing him to do outside work, for personal injuries caused by the fall of a staging on which he was set at work to paint window frames of a building of the defendant by a sub-foreman of the defendant whose duty it was to set the painters at work and look after them, where there is evidence that the staging was defective because the cross pieces by which the staging had been fastened to the window sills had been unfastened for some purpose and that the cross piece at the window toward which the plaintiff was going and at the place where he fell had remained unfastened or had been nailed insecurely and that this defect would have been discovered by a reasonable inspection, the question of the defendant's negligence is for the jury.

In the case above stated it appeared that before and at the time of the accident workmen on the inside of the building, who were employed by an independent contractor, were engaged in throwing lumber through the window to the ground, but there was no evidence that any of the lumber struck the cross piece or even the staging itself, and it was *held* that, if it could be inferred from circumstantial evidence that the cause of the accident "might have been the throwing of planks out of the window against the cross piece," yet it would be a question for the jury whether they would draw this inference or would find that the defendant's negligence in leaving the cross piece unfastened or insufficiently fastened was the cause.

TORT for personal injuries sustained on May 6, 1910, when the plaintiff was in the employ of the defendant as a painter on outside work, by reason of the breaking of a staging upon which the plaintiff had been directed to stand. Writ dated January 5, 1911.

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The second count of the declaration as amended, which is referred to in the opinion, alleged that it was the duty of the defendant to furnish the plaintiff with suitable and proper ways and appliances for the proper prosecution of his work as such employee and to keep such ways and appliances in repair and proper condition; that the defendant negligently failed to furnish such proper ways and appliances and to keep them in repair and proper condition; whereby the plaintiff while in such employ and while in the exercise of due care was injured permanently.

The defendant's answer contained a general denial, and also alleged that any claim of the plaintiff against the defendant had been satisfied in full by the payment of the sum of $200, whereupon the plaintiff had executed a release under seal, of which a copy was annexed.

In the Superior Court the case was tried before *Stevens*, J. At the close of the plaintiff's evidence, which is described in the opinion, the defendant relied on a release under seal purporting to have been signed by the plaintiff by his mark, and offered no evidence on the other issues. The judge then refused to order a verdict for the defendant and submitted to the jury the questions whether or not the plaintiff signed the release, and, if so, whether he comprehended what he was doing. The judge also submitted to the jury the assessment of damages. The jury answered the questions pertaining to the release in the negative, and assessed the damages in the sum of $12,500. Thereupon the judge ordered a verdict for the defendant, making the following statement: "It appeared to me that the cause of the accident might have been the throwing of planks out of the window against the cross piece or putlock,* which was done by employees of an independent contractor."

The judge reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment should be entered for the defendant; but that, if there was evidence on which the jury properly might have returned a verdict for the plaintiff, judgment should be entered for the plaintiff in the sum of $12,500.

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* The New English Dictionary gives "putlock" as appearing to have been an earlier form of "putlog" and states that its derivation is obscure.

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J. F. Warren, for the plaintiff.

E. I. Taylor, for the defendant.

BRALEY, J. The negative answer of the jury having disposed of the defence that the action was barred by the release and the plaintiff's due care being conceded, the only question on the report is whether there was any evidence that his injuries were caused by the defendant's negligence. The plaintiff was employed by the defendant as a painter on outside work and the evidence was undisputed, that on the morning of the day of the accident he was directed by his sub-foreman, whose duty it was to set the painters at work and to look after them, to go upon the staging and paint the windows of the defendant's building in process of construction. It was the defendant's duty, at common law under which the action is brought, to provide the plaintiff in the performance of his work with reasonably safe appliances, and to maintain them in a reasonably safe condition. *Ruddy* v. *George F. Blake Manuf. Co.* 205 Mass. 172, 178, 179, and cases cited. And the employer cannot relieve himself from liability by delegating the performance of this duty to competent employees even if he provides them with suitable materials. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198, 204, 205. *Twomey* v. *Swift*, 163 Mass. 273. *Perry* v. *Webster Co.* 216 Mass. 147. If, however, the workmen within the scope of their employment erect the staging for themselves as the work proceeds, the employer, where he has provided proper materials, is not liable to an injured fellow workman if the staging is defective and unsafe. *Brady* v. *Norcross*, 172 Mass. 331, 333, and cases there collected. *Granara* v. *Jacobs*, 212 Mass. 271, 274. But a staging in position furnished by the employer is a structure or appliance within our decisions for which, if defective and unsuitable, he is responsible. *Arkerson* v. *Dennison*, 117 Mass. 407. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131, 139. *Feeney* v. *York Manuf. Co.* 189 Mass. 336, 339. *Johnson* v. *Otis Elevator Co.* 211 Mass. 504.

It is apparent that the painting could not have gone on without using the staging, and there is no evidence that the painters were to build their own stagings from materials supplied by the defendant or that they were to use a staging already built by other

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mechanics employed in different branches of the work. The defendant offered no evidence and the jury, under the second count of the declaration as amended, by the uncontradicted testimony of the sub-foreman, that the staging was in place before he came on the "job" and that before setting the men at work he obeyed the instructions given him by going over the staging to ascertain whether it was well secured and properly put up, would have been warranted, in finding that the defendant originally had provided or had accepted for its own use the staging here in question. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487. *D'Almeida* v. *Boott Mills*, 209 Mass. 81, 86, and cases cited. The jury further could find that the plaintiff while performing his work in the usual way must pass over this staging from the windows he had painted to the next unpainted window, and that as he was passing the staging suddenly gave way, throwing him to the ground, causing severe and permanent injuries.

If the accident arose from a defect in the staging which could have been guarded against by the exercise of reasonable diligence, the plaintiff is entitled to damages. *Arkerson* v. *Dennison*, 117 Mass. 407. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487. *Twomey* v. *Swift*, 163 Mass. 273. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. What could the jury have found on all the evidence? The construction was simple. The uprights were held in position by braces or ledgerboards from which cross pieces or putlocks extended to the building resting on the window sills. The jury as matter of common knowledge, as well as from the evidence of the sub-foreman, could have found that, unless the cross pieces were fastened in some way to the window sills or side of the building, the staging was insecure, and that if an unfastened cross piece gave way the planks were liable to tilt and drop. While it was undisputed that workmen followed the painters, placing copper on the window sills, and that to do this work properly the cross pieces would have to be removed and replaced, the evidence failed to show that copper had been affixed to the sill where the cross piece went down, and the sub-foreman testified that when he made his examination the staging apparently was well secured, although he did not remember whether all the cross pieces were nailed to the sills, and that he did not look at every one of them. It also could have been found

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from his description of the accident, that the cross piece at the window to which the plaintiff was going and at the place where he fell, "was nowheres to be seen" after the planks supporting the plaintiff went down. The jury properly could infer and find, that no copper had been placed on this sill, that the cross piece remained either unfastened or insecurely nailed, whereby the staging was rendered weak and insecure, and that if reasonable diligence had been used the defect would have been discovered and remedied.

The plaintiff therefore had made out a case on the pleadings and evidence for the jury, and a verdict for the defendant should not have been ordered, unless it conclusively appears, as the trial judge ruled, "that the cause of the accident might have been the throwing of planks out of the window against the cross piece or putlock, which was done by the employees of an independent contractor." It is unquestioned that the workmen on the inside of the building employed by an independent contractor were engaged in throwing lumber through the window to the ground. A careful examination of the record, however, fails to show that any of the lumber struck the cross piece or even the staging itself. If this assumption then must rest wholly on circumstantial probability, yet the plaintiff still had the right to have the jury determine the question of the actual cause if more than one inference properly could be drawn. *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168. *Lockwood* v. *Boston Elevated Railway*, 200 Mass. 537. *Donovan* v. *Chase Shawmut Co.* 201 Mass. 357. *Ruddy* v. *George F. Blake Manuf. Co.* 205 Mass. 172, 182.

The ruling having been erroneous, the plaintiff is to have judgment for the amount stipulated.

So ordered.

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CITY OF BOSTON *vs.* LOUIS EPPLE.

Suffolk. March 17, 1915. — May 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Licensing Board of the City of Boston. Boston. Fees.

Under St. 1906, c. 291, § 4, which provides that all licenses issued by the licensing board of the city of Boston "shall be recorded in the office of said board, and all fees for said licenses shall be paid into the treasury of said city," the fees paid by licensees under R. L. c. 100, § 10, of $1 to the secretary of that board as the recording officer for recording each license must be paid into the city treasury, and the licensing board have no power to direct by vote, "That the secretary need not turn over any more recording fees to the city."

CARROLL, J. The defendant is the secretary of the licensing board of the city of Boston. St. 1906, c. 291. He was appointed in June, 1906, and has acted continuously as such secretary up to the date of the writ in this action. At the beginning of his service he received an annual salary of $2,500. Since January 1, 1913, he has received a salary of $3,000 a year.

Under R. L. c. 100, § 10, each licensee, in addition to the fee required by § 19 of that chapter for the privilege of selling intoxicating liquor, is called upon to pay a fee of $1 to the recording officer for recording the license. Under § 45, the treasurer of each city and town is required, "within thirty days after the receipt of money for licenses for the sale of intoxicating liquors," to pay to the Treasurer and Receiver General "one-fourth of the amount so received." It has been the uniform practice throughout the Commonwealth under § 45, as well as under the earlier statutes (St. 1875, c. 99, § 10; Pub. Sts. c. 100, § 14), for city and town treasurers to pay over to the treasurer of the Commonwealth one fourth of the fees received for the privilege of doing business as a liquor dealer. "But said treasurers have never paid over to the treasurer of the Commonwealth any part of any amounts received for recording liquor licenses, nor made any return of such amounts, nor been required by the treasurer of the Commonwealth to make payment or return of such accounts."

Before the St. of 1906, c. 291, creating the licensing board of

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the city of Boston, the clerk or secretary of the board of police of the city of Boston, acting under St. 1885, cc. 83 and 323, recorded all liquor licenses and received and retained for himself $1 for recording each license.

St. 1906, c. 291, § 4, declares that except as otherwise provided, the licensing board shall exclusively exercise in the city of Boston all the powers conferred on the board of police for that city, and upon licensing boards by §§ 10–90, both inclusive, of R. L. c. 100, and by R. L. c. 102, relative to common victuallers and innholders; and that the board shall have charge of the licensing of picnic groves, skating rinks, intelligence offices, billiard tables and bowling alleys. The last paragraph of this section (§ 4) is as follows: "All licenses issued by said board . . . shall be recorded in the office of said board, and all fees for said licenses shall be paid into the treasury of said city."

Following the passage of this statute and up to 1913, the defendant paid over to the city of Boston all fees received by him for the recording of licenses.

On February 26, 1913, the licensing board passed this vote: "That the secretary need not turn over any more recording fees to the city." After the passage of this vote the defendant received for recording liquor licenses $1,634 in the year 1913 and $1,439 in the year 1914, making a total of $3,073, which he has not paid into the treasury of the plaintiff city but has appropriated to his own use. The question in the case is whether this sum of $3,073 received for the recording of liquor licenses, belongs to the defendant or to the city of Boston, the defendant maintaining that where the statute directs the payment to the city of "all fees for said licenses," it refers to the fees paid for the license, that is, the sum paid for the right or privilege to sell intoxicating liquor, and it does not refer to the fee paid for the mere recording of the license.

The decision in this case turns upon the true intent and meaning of the words, "and all fees for said licenses shall be paid into the treasury of said city," which words are contained in c. 291, § 4, St. 1906, under which statute the licensing board of the city of Boston was appointed by the Governor of the Commonwealth, and which board in turn under § 1 appointed the defendant, who has been acting as the secretary since 1906. What were the license

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fees referred to when the Legislature in the above quoted phrase directed the board to pay over all fees to the city of Boston? The Legislature had some purpose in view in using this language, and intended thereby to provide for the ultimate distribution of fees, a matter which under the then existing law was not clearly and sufficiently provided for. To determine the precise meaning of these words and the intent of the Legislature in adopting them, we must have resort to the provisions of law existing at the time the statute under consideration was enacted, and determine if possible what fees, if any, were to be paid to the licensing board, and whether the distribution and payment of these fees were already regulated and governed by statutes then in existence and which were not repealed by the act of 1906.

If any fees other than the recording fee were not properly payable to the licensing board, or if other fees were paid to it, and such fees were to be paid over by the board to the city treasurer under provisions of law then existing, it follows that the only possible fee referred to in the act creating the board is this recording fee, and the statute would be meaningless if it did not embrace this fee and provide for its payment to the city of Boston.

Under § 4 of the St. of 1906, c. 291, the licensing board was authorized to issue licenses for the sale of intoxicating liquors; but the board as such received none of the license fees paid for the right to carry on the liquor business. That money must be paid directly to the city treasurer, R. L. c. 100, § 42, so that the Legislature could not have had in mind the distribution of the liquor license money when it required the board to pay to the city all fees for licenses, because the distribution and payment of that money was already sufficiently provided for.

The board also was permitted to grant licenses to innholders and common victuallers; but under R. L. c. 102, § 2, no fee was to be paid to anyone for the privilege of carrying on the business of an innholder or a common victualler. See St. 1910, c. 383, which requires a fee for such license of not more than $5.

Under R. L. c. 102, § 186, in the city of Boston the board of police were given power to issue licenses to keepers of picnic groves, skating rinks, intelligence offices, billiard tables, bowling alleys, and under St. 1902, c. 187, § 4, to junk dealers. By St. 1906, c. 291, § 4, this power was given to the licensing board of the city

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of Boston, who were commissioned to receive a fee of not less than $2 for each of such licenses; but they were therein specifically ordered to receive such fees for the use of the city.

No fees, therefore, were received by the defendant in the years 1913 and 1914, whose distribution and final disposal were not already fully and clearly provided for under the law of the Commonwealth dealing directly with these licenses and the fees therefor. Applying the familiar rule of construction that every word and sentence in a statute is supposed to be inserted for a purpose, and to have some force and effect, the words "all fees for said licenses shall be paid into the treasury of said city," mean nothing unless they are aimed directly at this one fee for recording liquor licenses, which is the only fee received by the licensing board not fully taken care of in its distribution by existing law.

The agreed statement of facts declares that under the St. of 1885 the clerk of the board of police retained for his own use the recording fee of $1. In the St. of 1885, no mention is made of any fees, and there is no language referring to the recording fee or to its disposition; and it was probably because of this omission that it was then understood that the clerk had the right to retain this fee for himself. The Legislature undoubtedly was aware of this fact and inserted the clause under consideration in the St. of 1906, for the purpose of putting an end to the practice, thus diverting this fee, with all other fees, to the treasury of the city.

This determination of the Legislature in requiring the return to the city of all fees of any kind received by the board is in harmony with what seems to be its settled policy in compelling all salaried employees of the State, cities and towns, to account for all fees received by them. Under R. L. c. 26, § 17, all fees and commissions of city clerks, city treasurers, collectors of taxes, or any other officer of a city, must be paid into the city treasury. Fees for the copying of public records by an employee of the Commonwealth are to be paid into the treasury of the Commonwealth. R. L. c. 18, § 15. So with moneys received by the Secretary of State, by officers of public institutions, by the Attorney General and district attorneys, and by the reporter of decisions of the Supreme Judicial Court. R. L. c. 5, § 1; c. 6, § 56; c. 7, § 20; c. 165, § 67.

We are therefore of opinion that all the fees for the recording

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of liquor licenses, received during the years 1913 and 1914 and now held by the defendant, are the property of the plaintiff city.

The case comes before us on a report,* and judgment is to be entered for the plaintiff in the sum of $3,073, with interest from the date of the writ.

So ordered.

J. P. Lyons, for the plaintiff.

F. T. Hammond, for the defendant.

WILLARD B. BRYNE *vs.* NELLIE E. DOREY & another.

Middlesex. March 26, 1915. — May 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, & CARROLL, JJ.

Assignment. Contract, Performance and breach, Equitable defence of recoupment. *Practice, Civil*, Defence of recoupment. *Damages*, Recoupment.

A right of action to recover damages for the breach of a contract for support is assignable and R. L. c. 173, § 4, gives the assignee the right to sue on the contract in his own name.

Where a contract in writing for support is stated therein to be made in consideration of mortgages of certain real estate securing non-negotiable promissory notes for an amount named, and the contract, mortgages and notes bear a common date and are delivered at the same time as one transaction, the contract being given in exchange for the mortgages and notes, and immediately thereafter the mortgagor who is to be supported regains and retains possession of the mortgage notes, refusing to give them up, denying his liability thereon and paying no interest, while the mortgages are retained by the mortgagee and by him are caused to be recorded, the mortgagor cannot maintain an action for a breach of the contract to support him; because he has failed to perform his own contract, the performance of which is a condition precedent to the mortgagee's obligation to furnish the support.

The defence of recoupment of damages in an action of contract is an equitable one and does not depend on the rules relating to set-off, and where such a defence is alleged in the answer of two defendants their rights in equity as well as at law may be considered. Accordingly in the present case, where a husband and wife were sued jointly, it was *held*, that overdue and unpaid notes, which had been made by the plaintiff and had been given by him to both defendants, although made payable to the wife only, as a part of the transaction on which

* By *Wait*, J., to whom the case was submitted on an agreed statement of facts.

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the plaintiff's claim was founded, could be deducted in recoupment from the plaintiff's claim or, if in excess of that claim, could be used to extinguish it, no superior rights of third persons against either of the defendants having intervened.

CONTRACT by the assignee of the rights of John J. Dorey, for the alleged breach of an agreement in writing dated July 2, 1907, whereby the defendants, who were husband and wife, agreed to support John J. Dorey during the remainder of his life, the plaintiff seeking to recover damages for the failure to support John J. Dorey from the date of the agreement until May 19, 1911, which was the date of the assignment to the plaintiff. Writ dated June 7, 1911.

The defence of recoupment, which is referred to in the opinion, in addition to other defences was alleged in the answer as follows: "And the defendants further say that payment of the principal and interest [of the mortgage notes] has been duly demanded of the said John J. Dorey, who neglected and refused to pay the same, or any part thereof, and that upon May 19, 1911, the date of the alleged assignment set forth by the plaintiff in his declaration, there was due and payable to the defendants on account of interest on said mortgages the sum of $5,211, and the defendants ask to be recouped up to said amount of $5,211 against any judgment which the plaintiff may recover in this action."

In the Superior Court the case was tried before *Dana*, J.

By the instrument of assignment, which was under seal and was dated May 19, 1911, John J. Dorey assigned to the plaintiff "all claims and demands which I now have, or which I may have at any time against John W. Dorey and Nellie E. Dorey for every sum and for all sums of money now due or which may hereafter become due to me under a contract bearing date of July 2nd, 1907, executed by the said John W. Dorey and the said Nellie E. Dorey, whereby the said John W. Dorey and the said Nellie E. Dorey have agreed to furnish support to me, and for every sum and for all sums of money and demands which are now due or may become due to me as damages for breach of said support agreement, and all my right, title and interest in and to any property, or any rights to which I may be entitled under said support agreement or by reason of any breach of said support agreement."

The contract on which the action was brought was as follows:

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"Know all men by these presents that we John W. Dorey and Nellie E. Dorey both of Somerville Middlesex County Massachusetts, husband and wife in consideration of certain mortgages made by John J. Dorey to said Nellie E. Dorey amounting to the sum of twenty-seven thousand dollars on property in said Somerville and in Boston Suffolk County Massachusetts, said mortgages being dated July 2, 1907 — and duly recorded do hereby for ourselves, our heirs, executors, administrators, and jointly and severally covenant and agree with John J. Dorey his heirs, executors, administrators, that we the said John W. Dorey and Nellie E. Dorey will jointly and severally furnish to said John J. Dorey during said John J. Dorey's natural life a comfortable support and maintenance equal to the style and manner in which said John J. Dorey has been accustomed and used to furnish for himself. Such support and maintenance shall include necessary clothing, food, lodging, medicines, medical attendance, nursing, and all care and attendance which said John J. Dorey would reasonably furnish for himself in the manner in which he has been accustomed heretofore to maintain himself. And for the consideration aforesaid the said John W. and Nellie E. Dorey for themselves, their heirs, executors, and administrators do jointly and severally covenant and agree with said John J. Dorey, his heirs, executors, and administrators that they, the said John W. and Nellie E. Dorey will jointly and severally support and maintain the minor child of said John J. Dorey, named Robert James Dorey and also the child now expected to be born to said John J. Dorey by his wife Mary E. Dorey until said child or children shall attain the age of eighteen years provided it is decreed by any court of competent jurisdiction that said John J. Dorey shall have the care and custody of said child or children or either of them. If only one of said children is decreed to said John J. Dorey's care and custody then the covenants and agreements herein contained shall apply only to the child so decreed to the care and custody of said John J. Dorey. Said care and support and maintenance to be supplied to said child or children by said John W. and Nellie E. Dorey shall be of the same kind and quality as said John J. Dorey would reasonably furnish for said child or children if said John J. Dorey was caring for, supporting and maintaining said child or children himself, said care, support and main-

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tenance to include clothing, food, lodging, medicine, medical attendance, nursing, reasonable opportunity for acquiring a reasonable education and such reasonable attention as would naturally be expected from said John J. Dorey toward said child or children.

"In witness whereof we hereunto set our hands and seals the second day of July, 1907.

Nellie E. Dorey
John W. Dorey."

The mortgages referred to in the contract and the mortgage notes were dated July 2, 1907. The mortgage notes, mortgages and the contract for support were all prepared by attorneys employed by John J. Dorey and were delivered as of their common date, July 2, 1907. The mortgages were recorded at once by the defendants and remained in their possession. Immediately thereafter, after the execution of the papers on the same day, John J. Dorey repossessed himself of both of the mortgage notes and refused to redeliver them to the defendant Nellie E. Dorey and retained possession of them until May 18, 1911, the day preceding the assignment of the contract for support to the plaintiff, when John J. Dorey was forced to return the notes to the defendant Nellie E. Dorey by a decree ordering him so to do, which is referred to in the opinion. No payment of principal or interest ever was made on the mortgage notes. Other facts are stated in the opinion.

At the close of the evidence the defendants asked the judge to instruct the jury as follows:

"1. If the jury shall find that on July 2, 1907, or immediately thereafter, John J. Dorey wrongfully retained or wrongfully took possession of the mortgage notes and wrongfully withheld them from the defendants until May 18, 1911, such action on his part constituted a breach by him of said support agreement, and the defendants meanwhile were under no obligation to support him, and the plaintiff cannot maintain this action.

"2. The plaintiff cannot recover for a breach by the defendants of said support agreement which was due to or occasioned by the fault or wrong doing of the said John J. Dorey.

"3. The mortgage notes and mortgages and the support agreement are not independent contracts, but are dependent each

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upon the other, and the mortgage notes with the mortgages are the consideration for the support agreement, and the defendants are entitled to have allowed by way of recoupment or counterclaim so much of the interest and principal due on said mortgage notes as shall be necessary to offset the amount of damages, if any, which the jury may find to be due the plaintiff in this action.

"4. If the jury shall find that there is any sum due the plaintiff for the support of John J. Dorey, the defendants are to be allowed as a set-off, by way of recoupment thereof, so much of the amount due as interest and principal on said mortgage notes, as may be necessary to offset any such amount found due from them."

The judge refused to give any of these instructions, and at the request of the plaintiff made the following ruling:

"The defendants are not entitled to recoup in this action any unpaid interest or unpaid principal on the mortgage notes mentioned in the defendants' amended answer."

The jury returned a verdict for the plaintiff in the sum of $5,200.35; and the defendants alleged exceptions.

L. A. Mayberry, for the defendants.

T. W. Proctor, for the plaintiff.

BRALEY, J. While the terms of the assignment are very much broader in scope, the right of the assignor to recover any damages which accrued by reason of the alleged breach of the contract for support was assignable, under R. L. c. 173, § 4, and the action can be maintained in the name of the plaintiff, the assignee. *Parker* v. *Russell*, 133 Mass. 74, 75. *Gilman* v. *American Producers' Controlling Co.* 180 Mass. 319.

The consideration of the contract for support is stated to be certain real property mortgages made by the assignor to the defendant Nellie E. Dorey, to secure the payment of two non-negotiable promissory notes for the aggregate amount of $27,000. The notes, mortgages and contract bear a common date on which they were simultaneously transferred, and, having been given and received in consideration for each other, they are to be construed as dependent promises, even if in form they are unilateral. *Hunt* v. *Livermore*, 5 Pick. 395. *Stone* v. *Fowle*, 22 Pick. 166, 174. *Fort Payne Coal & Iron Co.* v. *Webster*, 163 Mass. 134.

It follows that, until the assignor in pursuance of the agreement

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delivered the notes and mortgages, the contract for support did not become operative and binding and he could not call for performance on the part of the defendants who, if he refused to perform, had the right to recover as damages the value of the contract of which they had been deprived. *Jewett* v. *Brooks*, 134 Mass. 505, 506.

The exceptions recite that the assignor "immediately thereafter on the same day . . . repossessed himself of both of said mortgage notes and refused to deliver them" to the mortgagee and payee, and the jury would have been warranted in finding from the proceedings in equity instituted by the defendants on November 16, 1907, the record of which was introduced in evidence, that the notes were not delivered or returned by the assignor until May 18, 1911, in compliance with the final decree. And from his answers to the original bill, the allegations of the crossbill, and the master's report, a further finding would have been warranted that he constantly asserted and contended that no valid contract existed of which performance by him lawfully could be demanded. The assignment having been dated the day following the date of the decree and the writ shortly after, the jury also could find that the period for which damages are demanded and were assessed is the time elapsing during the litigation made necessary by the plaintiff's repudiation of the agreement and retention of the notes.

If the contract, as established by the decree, imposed on the defendants, who are husband and wife, the duty to provide the assignor with support in accordance with its terms, the agreement on the part of the assignor to do no act which would render such support impossible resulted by necessary implication. *Hapgood* v. *Shaw*, 105 Mass. 276, 279. While the assignor, although living with them at the time of the negotiations, had been given by the contract an unlimited choice of the place or places where he would reside, yet he could not, on the one hand, insist on receiving performance, while on the other hand he retained possession and control of the consideration, denying absolutely the existence of any enforceable contract. And his persistent refusal to deliver the consideration may be treated at law as well as in equity as a justification for non-performance by the defendants. *Jewett* v. *Brooks*, 134 Mass. 505. *Lowe* v. *Harwood*, 139 Mass. 133. *Cook* v. *Sawyer*, 188 Mass. 163, 167. *Parrot* v. *Mexican Central Railway*, 207

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Mass. 184. *Neal* v. *Jefferson*, 212 Mass. 517, 522. *Holt* v. *Silver*, 169 Mass. 435.

The defendants' first and second requests for instructions directed the attention of the presiding judge to this question, and his refusal to give them in form or substance was erroneous.

The answer, however, not having pleaded the decree, which has the same effect as a judgment on the parties and their privies, the question whether it is a bar to the present action is not before us. *Hoseason* v. *Keegan*, 178 Mass. 247. *Barnes* v. *Huntley*, 188 Mass. 274. *Richards* v. *Keyes*, 195 Mass. 184. 1 Freem. Judgments (4th ed.) §§ 248, 249. R. L. c. 173, § 4.

But if, as the record now stands, the jury found that the assignor did not intend to repudiate the contract, the defendants, having pleaded this defence, contend that they are entitled to recoup so much of the principal and interest of the notes as might be necessary to offset any damages found due to the plaintiff, although no action for any excess, according to their tenor, over the amount required to extinguish the damages could be maintained thereafter. *Carey* v. *Guillow*, 105 Mass. 18. *Cox* v. *Wiley*, 183 Mass. 410. *Batterman* v. *Pierce*, 3 Hill (N. Y.) 171. *Britton* v. *Turner*, 6 N. H. 481. *Good* v. *Good*, 5 Watts, 116.

The plaintiff is subject to all the defences which would have been available against the assignor. R. L. c. 173, § 4. The claim for support and the claim on the notes the jury could find were understood by the parties, not as founded upon distinct transactions, but as concurrent and mutual obligations. The assignor could not be required to make payment unless the maintenance contracted for had been furnished, and the defendants were not required to furnish it except for compensation in the form stipulated. If ultimately they are found to be responsible in damages, the assignor is also liable on the notes which were overdue and unpaid at the dates of the assignment and of the writ.

The defence of recoupment is an equitable one not dependent on R. L. c. 174, relating to set-off, and under the allegations of the answer the rights of the defendants in equity as well as at law may be considered. *Dorr* v. *Fisher*, 1 Cush. 271, 275. *Stacy* v. *Kemp*, 97 Mass. 166, 168. *Jennings* v. *Moore*, 189 Mass. 197, 203. See *Puller* v. *Staniforth*, 11 East, 232.

It is no bar that the defendants, who are jointly and severally

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bound, have been sued jointly. Where no superior rights of third persons have intervened, equity will deal with the real transaction and adjust the equities between the parties accordingly. *Smith* v. *Felton*, 43 N. Y. 419, 423. *Loring* v. *Morrison*, 15 App. Div. (N. Y.) 498. And this rule was followed in *M'Hardy* v. *Wadsworth*, 8 Mich. 349, an action at law. It being manifest that complete justice can be done and circuity of action avoided, no sound reason appears why the defendants should be compelled to resort to an independent action on the notes. *Harrington* v. *Stratton*, 22 Pick. 510, 517; *Sawyer* v. *Wiswell*, 9 Allen, 39, 42; *Carey* v. *Guillow*, 105 Mass. 18; *Davis* v. *Bean*, 114 Mass. 358; *American Bridge Co. of New York* v. *Boston*, 202 Mass. 374; *Deeves & Son* v. *Manhattan Life Ins. Co.* 195 N. Y. 324.

The plaintiff cites and relies upon *Brighton Five Cents Savings Bank* v. *Sawyer*, 132 Mass. 185, and *Isenburger* v. *Hotel Reynolds Co.* 177 Mass. 455. But in these cases the promissory notes sued on were contracts which could be enforced for the full amount without performance by the plaintiff of executory agreements which were held not to be part of the same transaction. The defendants' third and fourth requests were denied wrongly, and the ruling made at the plaintiff's request should have been refused.

We have considered all the questions argued and for the reasons stated the exceptions must be sustained.

So ordered.

HENRY D. FILLMORE & another *vs.* GEORGE T. JOHNSON.
GEORGE T. JOHNSON *vs.* HENRY D. FILLMORE & another.

Suffolk. January 12, 1915. — May 28, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Construction. *Estoppel*. *Evidence*, Admissions by conduct. *Reference and Referee*. *Practice, Civil*, Auditor's report, Exceptions, Verdict. *Interest*. *Words*, "Actual cost."

Where a millowner, who theretofore had been engaged in manufacturing large sheets of tissue, called jumbo or parent rolls, which he sold to manufacturers who reduced the tissue to the size and condition in which it was sold to dealers

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as "toilet" paper, made a contract with a customer who agreed to take the entire product of his mill "finished in tissue toilet paper, rolls and packages, made and put up in such regular standard marketable shapes and sizes" as the customer should determine to be best suited for his business, and the price to be paid was based on the number of pounds of finished toilet paper contained in each case, at the market price per pound of tissue in parent or jumbo rolls, to which was to be added five per cent and the actual cost of finishing the tissue into toilet paper rolls and packages, it was *held*, that the five per cent was intended as the millowner's profit or compensation for doing work of a kind not theretofore undertaken by him, and that the "actual cost of finishing" included a shrinkage in weight of from ten to fourteen per cent in reducing the parent rolls of tissue to "toilet" paper, and also included the rent of premises used in finishing the paper, also charges for insurance, for depreciation of the part of the millowner's plant and machinery used for finishing, and for the personal services of a superintendent and bookkeeper, the items making up the cost being substantially the same as those that would be deducted from gross receipts in ascertaining net profits.

In an action brought by the millowner against his customer on the contract stated above, it appeared that, at a time when the plaintiff and the defendant were at issue as to the actual cost of finishing, the plaintiff sent to the defendant a letter in which he stated that the finishing cost was so high that the defendant could not afford "to pay the price it costs" and that "every case of paper we have shipped you has cost us more than you have been willing to pay for it therefore we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the meantime try and take care of your orders." It appeared that, upon the finding of the jury under the instructions of the presiding judge, the plaintiff was right as to the price insisted upon by him. *Held*, that the letter did not estop the plaintiff from claiming damages from the defendant for not taking paper after its date.

In the same action it appeared that the plaintiff sent to the defendant a letter in which he said, "we will arbitrate the new prices and meet you in every way that is mutually fair, that is fair to you and also to us," and that the defendant refused to leave the matter to arbitration. At the trial the defendant contended that his position at the time the plaintiff made this proposition was that, while the cost of finishing demanded by the plaintiff was wrong, he was ready to pay it if it was right. The plaintiff contended that the defendant at that time refused to pay the price claimed by the plaintiff whether it was right or wrong. The plaintiff argued that, if the defendant had taken the position then that he took at the trial he would not have refused to go to arbitration as to the actual cost of finishing, and that his refusal was some evidence that his position then was not what he contended at the trial that it was. The presiding judge instructed the jury that, although the defendant was not bound to arbitrate any question if he did not care to, his failure to arbitrate the actual cost of finishing could be taken into account by the jury if they thought it had any bearing upon the position which he then took. *Held*, that there was no error in the instruction thus qualified.

Where in an action of contract the plaintiff offers in evidence an auditor's report in his favor, and the defendant objects to a portion of the report, which is in fact objectionable, he has no right to except to the admission in evidence of this part of the report but should move to have the objectionable portion stricken

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out, and an exception by the defendant to the introduction in evidence of the objectionable portion which has not been stricken out must be overruled.

Where in an action of contract the plaintiff has introduced in evidence an auditor's report in his favor, which contains certain erroneous portions that have remained as a part of the report because the defendant has failed to ask to have them stricken out, the defendant is entitled to have the jury instructed that in so far as the auditor's report differs from the rulings of the judge it must be disregarded, and an exception to a refusal to give such an instruction will be sustained.

In an action of contract, where the declaration contains two counts and the defendant admits that the plaintiff is entitled to recover on the second count but contests his liability upon the first count and the jury return a general verdict for the plaintiff on both counts for a certain amount of money, from which it is impossible to know what part of the damages was awarded on the second count and how much upon the first count, if the defendant upon exceptions shows that the presiding judge erred in refusing to give an instruction to the jury to which the defendant was entitled, so that his exceptions must be sustained, the verdict cannot stand for any amount.

In an action of contract for the price of certain merchandise furnished by the plaintiff under a contract in writing, where by the terms of the contract the agreed price for cash shipments was to be due thirty days thereafter, *it seems*, that the plaintiff, if entitled to recover, can recover interest computed on the amount due for each shipment from the expiration of such thirty days without showing any demand for payment.

LORING, J. The circumstances which gave rise to this action and cross action were in substance as follows. For convenience we shall speak of Fillmore and Slade as the plaintiffs and Johnson as the defendant, although Johnson is the plaintiff in the cross action and Fillmore and Slade are in that action the defendants.

Before the contract hereinafter stated between the plaintiffs and the defendant the plaintiffs were the owners of a mill at which they manufactured tissue out of which "toilet" paper was made. The tissue (which was the product of their mill) was manufactured in large sheets called jumbo or parent rolls. These parent rolls of tissue theretofore had been sold by the plaintiffs to manufacturers, who reduced them to the size and condition in which they were sold to retail dealers who again sold it for use as "toilet" paper. By an agreement between the plaintiffs and the defendant dated October 5, 1908, but in fact signed on January 15, 1909, the defendant agreed to take the entire product of the plaintiffs' mill, "finished in tissue toilet paper, rolls and packages, made and put up in such regular standard marketable shapes

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and sizes" as the defendant should determine best suited for his business. The price to be paid was based on the number of pounds of finished toilet paper contained in each case, at the market price per pound of tissue in parent or jumbo rolls, to which was to be added an amount of five per cent and the actual cost of finishing the tissue into toilet paper rolls and packages. Settlements were to be made thirty days from the date of shipment, and the defendant was to have a discount of three per cent at the time of settlement which however was not to apply to that part of the price made up of the finishing cost. The market price of tissue was to be fixed semiannually, on the first days of January and July for the succeeding six months, and the deliveries were to be f.o.b. on cars at North Bennington in Vermont, the place where the plaintiffs' mill was situated. A copy of this part of the contract is set forth in full in the footnote.* When the contract was made neither party was ready to carry it into effect, but in April, 1909, the plaintiffs' mill was ready to take on the work of "finishing" tissue into "toilet" paper in accordance with the contract. It was then agreed by the parties that the market price of tissue was four cents per pound and should be so taken until July first of that year. The auditor to whom the case was referred found that at this time (April, 1909) the plaintiffs submitted as an estimated cost of manufacturing the tissue into toilet paper "$1.71 per case," but that the defendant would not agree to that as a correct price for the cost of finishing. At the plaintiffs' request he submitted a price he was willing to pay. Thereupon the plaintiffs agreed to go ahead and try manufacturing

* "The same to be based on the number of pounds of tissue contained in each case at the fair market price per pound of equal quality and weight tissue, where the same is sold to manufacturers of toilet paper in parent or jumbo rolls; the prevailing market price to be fixed semi-annually on the first day of January and July for the succeeding six months. There is also to be added to the value of the number of pounds of tissue contained in a case an amount of five (5) per cent; to the above combined amount the actual cost of finishing the tissue into toilet paper rolls and packages is to be added, constituting the cost per case to be paid by the said Johnson, said price to be F.O.B. cars No. Bennington, Vermont. Settlements to be made thirty days from date of shipment, and a discount of three (3) per cent is to be allowed at time of settlement on value of the invoice excepting the said discount is not to apply on that part of the case price charged as finishing cost."

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on the terms suggested by the defendant, leaving open the question of finishing cost. The dispute as to the amount of the finishing cost "remained a continual subject of debate, by correspondence and interview, during the summer and fall of 1909." The plaintiffs filled such orders as were given by the defendant and invoiced their shipments at prices suggested by the defendant. The auditor made this further finding: "In making up this particular item [of the actual cost of finishing] Fillmore and Slade included an estimate of fifty cents per case to cover such fixed charges as heat, light, rent, office expenses, superintendence, repairs, depreciation, labor of shipping and a number of incidentals, which I find were all properly chargeable to manufacturing expense as finishing cost under the contract. The other and direct expenses of converting the big rolls and preparing the product for shipment consisted of charges for perforating, tightening, bands, including putting them on, cores, shooks, assembling shooks into cases, and shipping, all of which added to the charge per case of fifty cents made a total of one dollar and seventy-one cents ($1.71)." The auditor found that the charge of $1.71 a case "for the actual cost of finishing" was correct. He found that on the first of July the parties agreed that the market price per pound of tissue was four cents and that on December 13 the defendant refused to pay the price of $1.71 asked for cost of finishing and refused to take goods and merchandise on that basis. The plaintiffs thereupon notified the defendant that they would not ship any more goods at "the prices which had prevailed previously," and would insist upon $1.71 per case for the "actual cost of finishing." "This proposition" the defendant "declined to agree to." In the following July (July, 1910) the plaintiffs brought the first action now before us. The declaration in this action contained two counts, one (the first count) for damages suffered by them from the defendant's refusal to take the output of their mills from December 13, 1909, to the termination of the contract on January 1, 1912, and the second count for "toilet" paper delivered between November 15 and December 4, 1909. The plaintiffs also claimed interest from January 4, 1910, on the amount due for the "toilet" paper delivered, on the ground that they had made a demand for payment on that day. The cross action brought by Johnson was based on the ground that the contract was broken

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by the plaintiffs and not by him. In it he sought to recover the damages suffered by him from the plaintiffs' alleged breach of the contract.

At the trial the defendant asked for thirty-three rulings and took exceptions to the refusal of the judge * to give them. He also took exceptions to five different parts of the judge's charge to the jury. In addition he took an exception when the auditor's report was put in evidence, which will be stated later on. On November 7, 1913, the jury returned a general verdict for the plaintiffs in the first action, in the sum of $4,962.22. In the cross action they found for the plaintiffs in the main action.

In his argument here the defendant has cut adrift from the exceptions which he took at the trial, and has contended that there are six questions of law for this court to decide. These questions are stated in the footnote.† We shall take up these questions of law in the order in which they are stated by the learned counsel for the defendant.

1. The first two propositions upon which the defendant insists are that the question of what items ought to be included in the "actual cost of finishing" was a question of law for the court and as matter of law that many of the items included by the plaintiffs in the charge of $1.71 per case for "actual cost of finishing" were items which ought not to be included in it. One of the items

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* *Lawton*, J.

† "1. Had the plaintiffs a legal right to charge, either as a part of the finishing cost or in any other way, for loss occasioned by 'shrink?'

"2. Had the plaintiffs a legal right to charge as a part of the finishing cost either for insurance on any part of their plant, or for depreciation of any part of their plant or machinery, or for rent of any part of their premises, or for personal services of the plaintiffs themselves as 'superintendent' or for 'office work,' or for other things mentioned at the bottom of page 11 of the bill of exceptions?

"3. Should the court have ruled that 'the actual cost of finishing' was not a matter of estimate which could be made in advance?

"4. Should the court have instructed the jury as to the plaintiffs being estopped by their letter of December 4th, from claiming damages for not taking their paper after that date?

"5. Should the court have instructed the jury that Johnson was under no obligations to arbitrate the proposed estimated finishing costs?

"6. Was that part of the auditor's report to which the defendant excepted properly admitted?"

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to which he objected was the loss occasioned by the fact that five hundred pounds of tissue were shrunk in the course of manufacturing to about four hundred and thirty to four hundred and fifty pounds of finished "toilet" paper. Other items (included in the cost of $1.71) objected to by him were what were called overhead charges. The defendant particularly objected to the following items being included in the cost of finishing, namely, items for rent of premises used in finishing the paper, for insurance, depreciation of that part of the plaintiffs' plant and machinery which was used for finishing, and for personal services of a superintendent and bookkeeper. Upon these points the presiding judge in his charge to the jury said: "I must inform you here [that] what the contract means is for me to say, it is not for you. You will have to take my say about that." Having instructed them that the construction of the contract was a matter to be determined by him, the judge went on to instruct them that the question of what charges were to be included in finishing cost was a question of fact to be decided by them. In that connection he put to them the case of a man who bought tissue from a manufacturer and then converted it into "toilet" paper; and he told the jury that whatever expenses would be incurred under those circumstances would be the expenses which these plaintiffs had a right to include in the "actual cost of finishing the tissue into toilet paper rolls and packages" under the contract between the plaintiffs and the defendant. It is the contention of the defendant that the "actual cost" is restricted to money paid out and therefore cannot include the particular items mentioned above, and in that connection he relies upon *Lexington & West Cambridge Railroad* v. *Fitchburg Railroad*, 9 Gray, 226; *Newton, petitioner*, 172 Mass. 5, 10; *Old Colony Railroad, petitioner*, 185 Mass. 160. It is established by these and other cases that in certain connections actual cost does mean money paid out. But we are of opinion that the words "actual cost" in this contract cannot be so limited. It appeared that there was a shrinkage in weight of ten to fourteen per cent in reducing the tissue in parent rolls to "toilet" paper. This loss in weight was a cost of finishing which would have been incurred had the manufacturer of "toilet" paper bought his tissue in the market and finished it himself. In our opinion it was and without question could be found by

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the jury to be a cost of finishing in the case at bar where the plaintiffs (who theretofore had been manufacturers of tissue only) had undertaken to convert the tissue (the product of their factory) into "toilet" paper for the defendant under this contract. Unless this loss of ten to fourteen per cent in weight was a part of the "actual cost of finishing," the plaintiffs had made a contract which on its face seemingly was bound to end in a loss. The defendant's answer to this is that the five per cent which by the terms of the contract was to be added "to the value of the number of pounds of tissue contained in a case" was to cover this and other similar losses. But an addition of five per cent does not make good a shrinkage of ten to fourteen per cent. Manifestly the five per cent was added to the "actual cost of finishing" as the plaintiffs' profit or compensation for doing work of a kind not theretofore undertaken by them. The other items included by the plaintiffs in the "actual cost of finishing" and objected to by the defendant stand on substantially the same ground.

We are of opinion that where, as in the case at bar, the price agreed upon is the cost actually incurred, to which is to be added a percentage for profit or compensation, the items making up the cost are substantially if not exactly the same as the items to be deducted from gross receipts to ascertain net profits. It is settled in such cases that overhead charges here objected to by the defendant are items to be deducted from gross, to ascertain the amount of net, profits. *Stone* v. *Wright Wire Co.* 199 Mass. 306. *Stein* v. *Strathmore Worsted Mills, ante,* 86.

This disposes of the first two propositions put forward by the defendant.

2. There was confusion of thought both on the part of the plaintiffs and on the part of the defendant as to their rights under the contract. There was evidence from which the jury could have found that the plaintiffs insisted not only that the defendant should pay "$1.71 per case" for the actual cost of finishing, but in addition that they insisted that he must agree in advance that that was the correct cost of finishing, and that if he did not agree to it in advance they (the plaintiffs) would not continue their deliveries under the contract. The presiding judge told the jury that if the plaintiffs refused to continue deliveries under the contract unless the defendant paid $1.71 per case

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for the actual cost of finishing, and if they were wrong as to that being the actual cost of finishing, they had no right to recover on the first count in the principal action. He then referred to the fact that the defendant had contended throughout that $1.71 per case was greater than the cost of finishing the tissue. With respect to that he instructed the jury that if the position taken by the defendant was that this amount was wrong but that he was ready to pay whatever was right, there was no breach on his part. With respect to the evidence that the plaintiffs had insisted upon the defendant's agreeing in advance to the correctness of the price insisted upon by the plaintiffs as the true cost of finishing, the judge told the jury that the defendant was not bound to agree in advance as to the true cost, and that if the plaintiffs refused to deliver because the defendant would not agree in advance to the true cost the plaintiffs had no right to recover under the first count. In other words the instructions given to the jury by the court were in accordance with the third proposition insisted upon by the defendant.

3. On the fourth of December the plaintiffs wrote a letter to the defendant in which they stated that their finishing cost was so high that "you [the defendant] cannot afford to pay the price it costs every case of paper we have shipped you has cost us more than you have been willing to pay for it therefore we will ask you to secure your requirements elsewhere." The full letter is given in the footnote.* The defendant's contention con-

* "Geo T Johnson & Co "No Benn Vt. Dec 4/09
Boston Mass

Gentlemen

We have tried out the making of 10# paper and find it is impossible for us to make it and also the shrink between parent roll and toilet roll and the finishing cost is so high that you cannot afford to pay the price it costs every case of paper we have shipped you has cost us more than you have been willing to pay for it therefore we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the mean time try and take care of your orders, you are sending them in faster than we can make them at present you doubtless will have no trouble in securing the goods elsewhere as you had several mills that wanted the business on the same terms you offered us. do not send any more orders for this month as you allready have sent in more than we can make.

Very Truly
Fillmore & Slade S."

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tained in the fourth proposition of law insisted upon by him is that the judge should have instructed the jury that by this letter the plaintiffs were estopped from claiming damages from the defendant for not taking paper after that date. The judge refused so to rule and we are of opinion that in doing so he was right. This letter of December 4 was written at a time when the plaintiffs and the defendant were at issue as to the actual cost of finishing, the plaintiffs insisting that $1.71 was correct and the defendant insisting that it was not. Under these circumstances the plaintiffs in effect wrote to the defendant that the finishing cost insisted upon by them was so high that according to the plaintiffs' statement the defendant could not afford to pay it, and they suggested that the contract had better come to an end and he had better go elsewhere for the "toilet" paper he required. This did not create an estoppel if (as the jury must have found under the instructions of the judge) the price insisted upon by the plaintiffs was correct and all the plaintiffs did insist upon was that that price should be paid when the goods were delivered.

4. The next proposition is that the defendant was under no obligation to arbitrate the proposed estimate of finishing cost. This proposition arose in connection with a letter written by the plaintiffs to the defendant dated December 18, 1909, in which they said in answer to a letter of the defendant of December 16, "We will arbitrate the new prices and meet you in every way that is mutually fair, that is fair to you and also to us." The letter in full is set forth in the footnote.*

As we have already said, it was the defendant's contention at the trial that his position in December was that while the cost of finishing demanded by the plaintiff was wrong he was ready to pay it if it was right. On the other hand it was the plaintiffs'

"North Bennington, Vt., Dec. 18/09

* "Geo. T. Johnson & Co.
Boston Mass

Gentlemen. Answering your letter of the 16/09 will say we will arbitrate the new prices and meet you in every way that is mutually fair, that is fair to you and also to us whatever we do let us do it at once, we are waiting on you, please give us your views at once, when here you were satisfied the old prices were not high enough, let us know what you consider right.

Very Truly
Fillmore & Slade per Slade."

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contention at the trial that the defendant in December took the position that he would not pay $1.71 a case for finishing, whether that was right or wrong. At the trial the plaintiffs argued that, if the defendant's position in December had been in fact what he now contends that it was, he would have been glad to have gone to an arbitration on the actual cost of finishing, and that his refusal to do so was some evidence that his position then was not in fact what he now contends that it was. The jury were in effect told that the defendant was not bound to arbitrate any question if he did not care to. But that on the question of what position the defendant took in December, 1909, his failure to arbitrate the actual cost of finishing could be taken into account by the jury if they thought it had any bearing on that question. The judge ended the portion of his charge which dealt with this matter in these words: "Bear in mind just what the point of that arbitration is: it is simply evidence to be given such weight as you think it should be given, none at all if you say none at all or such weight as the plaintiff says it should be given as bearing upon the question of what was his real intention when he said 'Well, I will pay the contract prices; those aren't the contract prices, and further, I won't pay them.'" We are of opinion that there was no error in the judge's charge with respect to the defendant's refusal to arbitrate.

5. When the auditor's report was put in evidence the defendant "objected to the introduction of all that portion of the report contained beginning in the last paragraph at the bottom of page 13, as follows: 'That by (Johnson's) refusal to assent to the schedule of prices asked by (Fillmore and Slade) when the subject was finally considered on or about December 13, 1909, [he] violated the contract and then committed a breach of the same, and subsequently by refusing to arbitrate or consider the prices asked by the plaintiffs, and by refusing on January 1, 1910, to pay the amount then due for sales to him consummated in the previous months of November and December, for which demand for payment had been made, all constitute a breach and final repudiation of the contract between the parties,' but the court overruled the objection and the defendant" took an exception. This exception is not well taken. This was part of the auditor's report. The plaintiffs had a right to introduce the auditor's report in evidence.

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The portion of the auditor's report objected to by the defendant ought to have been stricken from the report both because it was a conclusion of law and because (so far as a part of it goes) it was wrong. But that was ground for striking out that portion of the auditor's report, not for its not being introduced in evidence so long as it was not stricken out.

From what has been said already it is plain that a part of the portion of the auditor's report objected to by the defendant was wrong. It was wrong as matter of law to rule "that by his (Johnson's) refusal to assent to the schedule of prices asked (by Fillmore and Slade) when the subject was finally considered on or about December 13, 1909, [he] violated the contract and then committed a breach of the same." It was also wrong in the statement that the defendant "subsequently by refusing to arbitrate or consider the prices asked" by the plaintiff committed a breach of the contract. Whether it was wrong in the conclusion that the defendant "by refusing on January 1, 1910, to pay the amount then due for sales to him consummated in the previous months of November and December, and for which demand for payment had been made" committed a breach of the contract, need not be determined now. Although the exception taken to the refusal of the judge to exclude this portion of the auditor's report, when it was offered in evidence, was not well taken, there were three rulings (set forth in the footnote) * asked for by the defendant which ought to have been given. They were not given by the judge either in terms or in substance. The defendant's proper remedy was (as we have already said) to have had this portion of the auditor's report stricken out. But so long as it remained in the report he was entitled to have the jury told that so far as the auditor's report differed from the rulings of the judge the auditor's report was to be disregarded. The exceptions taken to the refusal to give these three rulings must be sustained.

* "16. That in and so far as the auditor's report contains rulings of law in conflict with the rulings of law given by the court, then it must be disregarded.

"17. That if any finding or conclusion of the auditor is based upon a mistake in law, such finding or conclusion should be disregarded.

"18. That if the auditor finds Johnson broke the contract because the auditor finds that Johnson refused to agree in advance to pay a specified amount as the finishing costs, then that finding should be disregarded."

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6. We have dealt with the only questions argued. We treat points not argued as waived.

7. As we have already said, the verdict returned by the jury in the first action was a general verdict for the plaintiffs on both counts. The defendant at the trial admitted that the plaintiffs were entitled to recover on the second count. They claimed interest from January 4, 1910, on the ground that they made demand on that day for the sum due them for the "toilet" paper delivered and covered by the second count. The judge left it to the jury to include interest from January 4, 1910, or from the date of the writ as they found or did not find that there was a demand made upon that day. It is impossible to know, therefore, how much of the verdict of $4,962.22 was a finding on the second count and how much was a finding on the first count. The result is that the verdict cannot stand for any amount.

8. To prevent misapprehension we think we ought to add that it would seem that the ruling of the judge as to the date from which interest was to run was right only because of the claim for interest made in the declaration. The claim in the declaration was for interest from January 4, 1910. The amount due was by the terms of the contract due thirty days after shipment. It would seem that interest ran from the due date named in the contract without a demand being made. This point is not before us for decision and we add this to avoid misapprehension.

The entry in both cases must be

Exceptions sustained.

O. Storer, for Johnson.

F. P. Garland, (*H. Tirrell* with him,) for Fillmore and Slade.

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GEORGE H. BROWN, trustee in bankruptcy, *vs.* ORLANDO M. LUMBERT, trustee.

Barnstable. October 8, 1914. — May 29, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Trust, Discretionary power of trustee. *Bankruptcy*. *Equity Jurisdiction*, Of bill by trustee in bankruptcy.

A trustee in bankruptcy cannot by a suit in equity obtain the conveyance to him of real estate included in a devise to a trustee for the benefit of the plaintiff's bankrupt, where by the terms of the devise the whole control of the principal and income of the property is bestowed upon the defendant trustee with discretionary power to give or withhold any part of it and with a direction that nothing left by the testator to the bankrupt "shall be taken for his debts" but that the trustee shall "convey and give fully to [the bankrupt] whenever it appears that what he may convey or give shall not be taken for debts of [the bankrupt]," and where it does not appear that the discretionary power of the trustee ever has been exercised by giving anything to the bankrupt, and it does not appear that there ever has been a time since the creation of the trust when payments to the bankrupt would not have been taken for his debts or that he ever has been out of debt since the trust was created.

If in such a case the bankrupt is one of the heirs at law of the testator and, by reason of the absence of a devise over upon his death, the bankrupt as such heir at law has an interest in remainder in the real estate held in trust during his life, this is a vested interest which passed to him on the death of the testator and to the trustee in bankruptcy upon the adjudication in bankruptcy, so that the trustee in bankruptcy has no occasion to seek the aid of a court of equity.

RUGG, C. J. This is a suit in equity whereby the trustee in bankruptcy of Frank L. Lumbert seeks to obtain a conveyance of real estate devised for the benefit of the bankrupt by the will of his father, James M. Lumbert.*

The only portion of the will disclosed on the record is the clause set forth in the footnote.† The clause is badly drawn. That fact

* The bill was filed in the Supreme Judicial Court on February 2, 1914. The defendant demurred to the bill, and the case was heard by *De Courcy*, J., who made an interlocutory decree sustaining the demurrer. Later by order of *Hammond*, J., a final decree was entered dismissing the bill. The plaintiff appealed from both decrees.

† "All the rest and residue of my estate real and personal I devise and bequeath one half to my said son Orlando forever, and one half to him in trust for said Frank L. the same to be conveyed to said Frank L. or to others as

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must be considered in construing it. As the whole will is not set out, no help can be gained from the rest of the will in construing this clause. By the true construction of this clause, nothing is to be conveyed or paid to the bankrupt or to others by his direction unless his brother, Orlando, the trustee named by the will, in his descretion deems the payment or conveyance to be for the benefit of Frank. After stating this in the first part of the clause, the testator gives as the reason for making all payments and conveyances dependent upon the discretion of Orlando, that it is his intention "that nothing left by me to said Frank L. shall be taken for his debts." The further expression of desire that Orlando make no conveyance or payment to Frank of property which might be taken for his debts is followed by the requirement to transfer to Frank whenever it appears that such payment will not be taken by his creditors. The clause construed as a whole means that the payments by Orlando to Frank rest entirely upon the discretion of Orlando and no absolute right is given to Frank to demand anything. The intention of the testator as disclosed by this clause is that the discretion of the trustee shall always stand between the property and Frank's creditors with respect both to principal and income. The broadest discretionary power is conferred to this end. Such a trust is valid and does not confer an absolute estate to the beneficiary. *Shattuck* v. *Stickney*, 211 Mass. 327. *Foster* v. *Foster*, 133 Mass. 179.

There is no allegation that the discretion vested in Orlando has been exercised in favor of Frank. Hence it does not appear that under the terms of the will anything has become, is now, or ever will be due to the bankrupt. There is no allegation in the bill that it ever has come to pass that payments to Frank would not be taken for his debts or that he has ever been out of debt. There is nothing to indicate that the discretion of the trustee has been abused or the trust perverted. *Leverett* v. *Barnwell*, 214

said Frank L. shall direct, provided said Orlando in his discretion deems it for the benefit of said Frank L. My intention herein being that nothing left by me to said Frank L. shall be taken for his debts, and I hereby desire said Orlando to refuse at all times to convey or pay to said Frank L. any property or give him any property herein bequeathed that may be taken for his debts, and I also require and command said Orlando to convey and give fully to said Frank L. whenever it appears that what he may convey or give shall not be taken for debts of said Frank L."

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Mass. 105, 108. Neither is there any allegation in the bill that Frank has attempted to exercise the power of directing the payment or the conveyance of the whole or any part of the fund to others than himself and that Orlando in the exercise of the discretion vested in him for the benefit of Frank has complied with such request. Hence it is unnecessary to consider questions which might arise on such a bill. See *Mason* v. *Rhode Island Hospital Trust Co.* 78 Conn. 81; *Wales* v. *Bowdish*, 61 Vt. 23; *Jourolmon* v. *Massengill*, 86 Tenn. 81; *Clapp* v. *Ingraham*, 126 Mass. 200.

Since no right is conferred upon the bankrupt to any part of the principal or income of the trust fund until the discretion to transfer is exercised by Orlando, and since there is no allegation that such discretion has been so exercised, the plaintiff fails to show that he is entitled to relief. If the testator made no devise over of the beneficial interest in the real estate which was devised to Orlando in trust, and for that reason some interest came to the bankrupt as an heir of his father, the plaintiff does not need the aid of a court of equity. The right of the bankrupt as to such property vested in him on the death of the testator and passed to his trustee on the adjudication.

The question whether the clause creates a spendthrift trust free from the control of creditors as to principal as well as income, and whether such a trust as to principal, if created, would be valid, somewhat discussed at the bar, does not arise in view of the construction of the only clause of the will now presented.* As the entire will is not set out and as the bill proceeds wholly upon the clause quoted, the decree dismissing the bill was right upon its allegations and is

Affirmed.

The case was argued at the bar in October, 1914, before *Rugg*, C. J., *Loring*, *Sheldon*, *De Courcy*, & *Crosby*, JJ., and afterwards was submitted on briefs to all the justices constituting the court.

R. B. Walsh, for the plaintiff.

D. T. Devoll, for the defendant.

* See *Maryland Grange Agency* v. *Lee*, 72 Md. 161; *Wagner* v. *Wagner*, 244 Ill. 101; *Siegwarth's estate*, 226 Penn. St. 591; *Kessner* v. *Phillips*, 189 Mo. 515, 524. Also *Shelton* v. *King*, 229 U. S. 90; *Broadway National Bank* v. *Adams*, 133 Mass. 170; *Young* v. *Snow*, 167 Mass. 287; *Dunn* v. *Dobson*, 198 Mass. 142; *Lathrop* v. *Merrill*, 207 Mass. 6.

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CLARK PARKER *vs.* LEWIS J. BIRD COMPANY.

Suffolk. January 12, 1915. — June 21, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Practice, Civil, New trial.

Under R. L. c. 173, § 112, providing among other things that a verdict may be set aside only upon a motion in writing "heard after notice to the adverse party," a reasonable opportunity for argument must be afforded to the party who has obtained a verdict before a motion for a new trial is granted.

Accordingly, if at a hearing of a motion of a plaintiff for a new trial after a verdict for the defendant the judge, after argument by the plaintiff's counsel as to a portion of the charge which the counsel argues was prejudicial to his client, states that he will look over the charge, and, upon the counsel for the defendant offering to argue against the motion, adds that he will "hear counsel further at a later time," and then, without giving the defendant's counsel an opportunity to be heard, grants the motion, an exception of the defendant thereto must be sustained.

Whether under any circumstances a biased or prejudicial statement in a charge to a jury may be an error of law so that a verdict returned in accordance with it may be regarded as "against the law" in a comprehensive sense, was not decided in this case, where a motion for a new trial because the verdict was "against the law" was granted by the trial judge, subject to an exception by the party who had obtained the verdict, on the ground that a certain portion of his charge might have been prejudicial to the party making the motion, and it appeared that both the parties to the action and the judge treated the ground stated by the judge as outside those stated in the motion, and it also appeared that the portion of the charge objected to was not biased or prejudicial.

A judge of the Superior Court has no power to order a new trial for a reason not expressly stated in a motion for a new trial or by fair implication included within the reasons therein stated.

CONTRACT OR TORT, with a declaration in two counts, the first count alleging a failure of the defendant, a licensed auctioneer, to deliver to the plaintiff certain goods which he had sold to the plaintiff at a public auction, and the second count alleging a conversion of the same goods. Writ dated June 24, 1913.

In Superior Court the case was tried before *Bell,* J. The defendant's evidence tended to show, and the plaintiff introduced no evidence to contradict it, that a condition of the sale was the payment of a deposit at the time of the sale. There was no dispute that, at the sale, the plaintiff bid in the goods in question, that he paid no deposit on them at that time, and that the next day the defend-

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ant sold the goods to another person. The plaintiff testified that he offered to pay for the goods at the time of the sale and desired to take them with him at that time, and that the defendant refused to accept payment and make delivery at that time, which, he contended, was a waiver of the condition as to the deposit. This evidence was controverted by the defendant's evidence. In this connection the judge charged the jury as follows: "Was there something said there which, fairly interpreted, could be regarded as a waiver of the right to have a deposit? Mr. Parker says that that night he asked for the present delivery of those things and offered to pay for them; that there was talk about there being a watchman there and their being secure there. Mr. Bird says the conversation was entirely limited to whether the goods would be safe, whether it would be proper to leave them there through the night; and if you believe the testimony of other witnesses it appeared at that time, the sale having lasted very late in the afternoon, the bill had not been made out and the accounts arranged, and you may find — it is not for me to say that you will — that at that time the account not having been made up, if they were not made up, Mr. Bird or the auctioneer were not aware whether Mr. Parker had made a deposit or had not made a deposit because the thing had not been figured out. That is for you to say. I don't say it, I simply suggest it to you, and it is for you to determine what that conversation was, what its effect fairly was. Was it understood between the parties that then the matter of deposit was gone into and it was of no consequence? Upon the probabilities which may aid you on that question both parties have offered evidence. Mr. Parker offered evidence that he had bought goods before and that he was known for some length of time — he puts it longer and apparently more intimately than Mr. Bird does — to the parties. Whether it would be probable that he would not require a deposit of him, how far that goes, it is for you to say. There is some suggestion, — I don't know but what I excluded that previous dealing, — but the fact that a man knows another does not necessarily mean that he knows him as a man of credit and responsibility, and there is some evidence, to which I call your attention, which might bear the other way, because I want to put the probabilities on both sides."

Then followed the "statement" which the trial judge, in the

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memorandum which he filed in granting the motion for a new trial and which is quoted in the opinion, stated "may have been prejudicial to the plaintiff." This was as follows: "If you believe the young man who collected deposits, when he asked a deposit of Mr. Parker, Mr. Parker said he had no money with him; and when Mr. Parker did pay this bill he didn't pay it himself but brought another man with him, according to his own account, who produced the money and paid it, — which might be an indication — don't give any weight to it because I suggest it — that he wasn't in funds himself but was depending on some other man to furnish this money to pay for these goods. It has this bearing, his offer to pay that night if he hadn't the money to pay with would be less probable, it is less probable if he had no money to pay with, because he might be detected if his offer had been taken up."

At the close of the evidence, by consent of the plaintiff, a verdict was ordered for the defendant upon the second count of the declaration.

The jury found for the defendant on the first count. A motion for a new trial was filed by the plaintiff. The motion itself, the disposition made of it and the exception of the defendant with regard thereto are described in the opinion.

The case was submitted on a brief by the defendant.

J. F. Cavanagh & P. A. Hendrick, for the defendant.

RUGG, C. J. This case comes before us on a report of questions raised on a motion for a new trial. A verdict was returned for the defendant. Thereafter, the plaintiff filed a motion in due form that the verdict be set aside, as against the evidence, and the weight of the evidence, and for the further reason "That the verdict of the jury is against the law." This motion came on for argument before the judge of the Superior Court who presided at the jury trial, and it was argued by the counsel for the plaintiff that "a new trial should be granted for the reasons set forth in the motion, and because the plaintiff was prejudiced by some remarks of the judge" given in the charge, which he proceeded to specify. At the close of the plaintiff's argument, the court said: "It did not think the verdict was against the evidence, that the evidence was pretty evenly balanced, that it was careful in stating the law and did not think it was against the law, that it thought

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this was a formal motion, but if counsel for the plaintiff felt that some remarks of the court injured the plaintiff, the court would look over the charge if counsel would furnish a transcript." That was an oral statement. It was not a disposition of the motion. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 388. St. 1911, c. 501. *Edwards* v. *Willey*, 218 Mass. 363. Thereupon, as the counsel for the defendant was about to argue in opposition to the granting of the motion, the judge said that he would look over the charge and "hear counsel further at a later time." Without notice and without argument by the defendant, at a later time the judge filed this statement respecting the motion: "After careful consideration of the matter, I am of opinion that some statements in my charge may have been prejudicial to the plaintiff and for that reason only I grant a new trial. The verdict was not in conflict with the evidence."

It was error for the judge to grant the motion without hearing the party in whose favor the verdict had been returned. At common law the court had power to set aside a verdict and order a new trial for any just cause, of its own motion and without request therefor. *Ellis* v. *Ginsburg*, 163 Mass. 143. *McKinley* v. *Warren*, 218 Mass. 310. It is required by R. L. c. 173, § 112, that a verdict be set aside only upon a motion in writing stating the reasons relied upon, "heard after notice to the adverse party." This has been held in general to be a constitutional regulation of the right of a trial by jury and not an impairment of its essential characteristics. *Opinion of the Justices*, 207 Mass. 606. The meaning of that part of the statute which makes imperative a hearing upon the written motion has not been declared by the court. By fair implication, that part of the statute enjoins that opportunity for reasonable argument be afforded to the party against whom the decision is made. As thus interpreted, the statute does not violate the constitutional right to a trial by jury.

The portion of the charge referred to in the statement of the judge plainly was not erroneous as matter of law. It appears to have been a suggestion entirely within the power of the judge in performing the duty of enabling the jury to reach a correct conclusion on the credible evidence. *Whitney* v. *Wellesley & Boston Street Railway*, 197 Mass. 495, 502. *Plummer* v. *Boston Elevated Railway*, 198 Mass. 499, 515. Only one unusually and acutely

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sensitive as to judicial propriety could have conceived it to have been possibly prejudicial. The statement on paper conveys no such impression.

It is not necessary to determine whether under any circumstances a biased or prejudicial statement by a judge in the course of a charge may be an error of law, and hence a verdict returned in accordance with it be regarded as against the law in a comprehensive sense, *Loveland* v. *Rand*, 200 Mass. 142, for the reason that neither the judge nor the parties have proceeded on that theory in the case at bar. Both parties and the judge have treated the ground here stated as outside the precise terms of the motion. The counsel for the plaintiff in arguing the motion seemingly did not undertake to include this reason among those set forth in the motion, but as something beyond those there specified. He argued that a new trial ought to be granted "for the reasons set forth in the motion and because the plaintiff was prejudiced by some remarks of the judge," to quote the phrase of his exceptions. This evidently means something more than was alleged in the motion. The oral statement of the judge at the conclusion of the argument shows that he did not think that he had made an error of law in the charge, or that the verdict was against the law. The written statement indorsed later on the motion itself appears to conform to this orally expressed view. Taken together, they disclose the thought that the grounds set forth in the motion were not those which moved the judge to action. We treat the case for purposes of decision as it has been treated by the judge and the counsel.

A judge of the Superior Court has no power to order a new trial for a reason not expressly stated or by fair implication included within the motion. *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223. *James* v. *Boston Elevated Railway*, 213 Mass. 424. Hence the verdict does not appear to have been set aside according to law.

The appeal was taken prematurely and must be dismissed. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31.

Exceptions sustained.
Appeal dismissed.

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EMMA WULFF vs. INHABITANTS OF WAKEFIELD.

Middlesex. March 11, 1915. — June 21, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

School and School Committee.

The determination of the methods of teaching and the management and direction of pupils and studies in high schools in this Commonwealth rest in the wise discretion and sound judgment of the teachers and the school committees, whose action in these respects is not subject to revision by this court.

Neither a pupil nor the parent of a pupil in a bookkeeping class in a high school has a right to insist that the teacher shall change his method of teaching by requiring the teacher to cease having one of the pupils do the merely clerical work of comparing the written answers of the pupils to problems with those in a key book and to do the work himself.

At the trial of an action under R. L. c. 44, § 7, for the alleged unlawful expulsion of the plaintiff from a high school, it appeared that the plaintiff was a member of a bookkeeping class, that the clerical work of comparing the written answers of that class to problems with a key book was done by one of the pupils in the class selected by the teacher; that by reason of one of the plaintiff's papers being incorrectly marked her stepfather complained of the use of a fellow pupil of the plaintiff in the correction of the papers to the teacher, to the principal and to the superintendent of schools and finally was given a hearing before the school committee, and that in each instance it was determined that the method used was proper; that, the plaintiff absenting herself from the class, she was notified that she must attend the class or be suspended; that she continued her absence and was suspended; that her stepfather then filed formal requests for a reinstatement of the plaintiff and a change in the method of teaching, and that after a hearing his requests were denied. *Held*, that there was no evidence of an unreasonable expulsion of the plaintiff from the school.

TORT under R. L. c. 44, § 7, for the alleged unlawful expulsion of the plaintiff from the high school of Wakefield. Writ dated May 29, 1912.

In the Superior Court the case was tried before *Dana*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant and reported the case to this court for determination.

F. W. Fosdick, (*J. J. Butler* with him,) for the plaintiff.

M. E. S. Clemons, for the defendant.

PIERCE, J. There was evidence tending to show that for some reason, presumably because of the burden of work, the

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teacher selected a pupil as an assistant to perform in his stead the purely mechanical work of comparing the answers to problems as worked out by pupils with the correct answers contained in a "key book." It happened that a certain problem submitted by the plaintiff to the assistant for examination was marked "wrong." The plaintiff worked upon it as best she could during a week and a half and then again submitted it to the assistant, who again declared it "wrong." She continued to work upon it for another week and a half, and then submitted the same result to the teacher, who went over it and called it correct. There was evidence that as a consequence of this error of the assistant the plaintiff "worried, was nervous, and lost her appetite and sleep. . . . She reported the incident to her mother and her stepfather, Mr. and Mrs. Kleeman." Kleeman protested against the manner of correcting the papers in turn to the teacher, the superintendent of schools, and to the principal of the high school.

Pending a hearing before the school committee Kleeman requested that the plaintiff's work be corrected by the teacher only, and not by a fellow pupil. He also "protested against the method of correcting the work and told the committee of the ill effect that the situation created by the method was having on the plaintiff's health." This request or petition was refused, after hearing, and thereupon the plaintiff requested that she be excused from the work.

Pending these hearings she did not attend to the work, and after the decision of the committee was communicated to her she continued to absent herself, although required to resume work on pain of suspension. Remaining obdurate she was formally suspended from school. Kleeman later filed a formal request to the same end and was granted a hearing, but the request was denied. A verdict was directed at the close of the plaintiff's case and hence the plaintiff is entitled to the view of the evidence most favorable to her contention.

The hearings apparently were informal, and we get a glimpse now and then of a disposition to make fun of the embarrassment and possible peculiarities of the stepfather; but on the whole there is no reason to find that there was not a fair hearing and a decision rendered in good faith.

The real and vital question is not whether the plaintiff was guilty

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of misconduct in refusing to attend her class, but whether a parent has the right to say a certain method of teaching any given course of study shall be pursued. The question answers itself. Were it otherwise, should several parents hold diverse opinions all must yield to one or confusion and failure inevitably follow. The determination of the procedure and the management and direction of pupils and studies in this Commonwealth rests in the wise discretion and sound judgment of teachers and school committee, whose action in these respects is not subject to the supervision of this court. R. L. c. 42, §§ 27 *et seq.* *Hodgkins* v. *Rockport*, 105 Mass. 475. *Watson* v. *Cambridge*, 157 Mass. 561. *Morse* v. *Ashley*, 193 Mass. 294. *Hammond* v. *Hyde Park*, 195 Mass. 29.

The case at bar is one purely of administrative detail and its exercise violates no legal right of pupil or parent. The plaintiff was without right in requiring that the principal personally should attend to the supervision of her individual work, perhaps to the neglect of more important duties.

While constrained to this decision we cannot refrain from the expression of disapproval of the practice of setting a rival pupil in judgment upon the work of an eager and zealous competitor. However honest that pupil may be, a mistake or error of decision inevitably leads to suspicion and often to charge of intentional wrong.

According to the terms of the report judgment is to be entered on the verdict.

So ordered.

WILLIAM B. ADAMS & another *vs.* MEMBERS OF THE LICENSING BOARD OF BOSTON.

Suffolk. March 18, 1915. — June 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, & PIERCE, JJ.

Intoxicating Liquors, License to sell. *Assignment*, Of liquor license. *Certiorari.*

Where the holder of a license of the first class to sell intoxicating liquors on certain premises in Boston, issued to the holder on May 1 of a certain year by the licensing board of that city, was adjudicated a bankrupt and on June 4 of the same year his trustee in bankruptcy, with the assent and approval of that

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board, sold and assigned the license to one to whom on that day the board issued a first class license to expire on April 30 of the following year and on such April 30 on his application issued to the same person another license for a year, if in the February before the expiration of the second license such holder makes application for a new license to be issued on the following May 1, to the issuance of which an owner of real estate within twenty-five feet duly objects in writing, such last holder of the license has not "held a license for the sale of intoxicating liquors upon said premises . . . for the two years next preceding the date of his application," within the meaning of R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, and therefore under the provisions of that section the licensing board must refuse to grant the application.

Whether a petition for a writ of certiorari is the proper method of bringing to this court the legality of a refusal by the licensing board of Boston under R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, to grant an application for a license for the sale of intoxicating liquors, was not decided in this case, where the petition was dismissed upon its merits.

PETITION, filed on April 28, 1914, and afterwards amended, for a writ of certiorari to quash the proceedings of the respondents refusing to grant a license of the first class for the sale of intoxicating liquors on the premises numbered 321 on Tremont Street and 98 on Pleasant Street in Boston.

The respondent filed an answer and the case was heard by *Carroll*, J., who ordered that the petition be dismissed and reported the case to the full court for determination.

H. V. Cunningham, for the petitioners.

L. G. Brooks, for the respondent, was not called upon.

PIERCE, J. For several years continuously previous to June 4, 1912, the premises numbered 321 Tremont Street and 98 Pleasant Street in Boston were occupied by one John A. Sullivan as a retail liquor dealer under and as the owner of a first class liquor license.

John A. Sullivan became bankrupt and on June 4, 1912, his trustee in bankruptcy, in consideration of a sum of money paid to him by the petitioners sold and assigned to the petitioners the license of Sullivan, with the assent and approval of the respondent. On June 4, 1912, a license of the first class to sell liquor on the premises, expiring April 30, 1913, was issued to the petitioners, and on May 1, 1913, a new and similar license, was issued to the petitioners.

On February 24, 1914, the petitioners made application for a similar license to expire on April 30, 1915.

On March 23, 1914, Mary E. Jones, an adjoining owner within

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twenty-five feet of the licensed premises, filed a protest conformable to R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1. The respondents after due hearing sustained the protest and on that ground refused the petitioners' application for a license.

Section 15 of R. L. c. 100, as amended by St. 1906, c. 287, § 1, reads: "If before the expiration of the ten days following the publication of the notice . . . the owner of any real estate within twenty-five feet of the premises described in an application for a license to be exercised by a common victualler to sell liquors to be drunk on the premises notifies the licensing board in writing that he objects to the granting of the license, no license to sell intoxicating liquors to be drunk on said premises shall be granted, unless the applicant therefor shall, for the two years next preceding the date of his application, have held a license for the sale of intoxicating liquors upon said premises."

In the case at bar the applicants had not held a license for the sale of intoxicating liquors upon the premises for two years next preceding the date of their application.

The statute is apt in phrasing and its explicit language leaves no room for doubt as to its purpose and intent. The board properly could not have construed the statute so broadly as to include the occupation of the applicant's assignors in determining whether the applicant had held a license for the two years next preceding the date of his application for a license.

Assuming, but without so deciding, that a writ of certiorari lies in a case like the present, (see *Dexter* v. *Town Council of Cumberland*, 17 R. I. 222, *Moran* v. *Gallagher*, 199 Mass. 486,) the petition must be dismissed.

So ordered.

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MARGARET McCUE, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 23, 24, 1915. — June 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Negligence, Street railway. *Evidence*, Of customary practice.

At the trial of an action of tort by an administrator against a street railway company for causing the death of a workman in a wide street in a city, which ran easterly and westerly and had a place in the middle reserved for the defendant's tracks, there was evidence tending to show that for about a month before the accident the plaintiff's intestate and others had been employed in resurfacing one side of the street at a point where it was straight and there was an unobstructed view for half a mile, that during that entire time the workmen necessarily were engaged in their tasks upon, beneath and around the defendant's tracks and that it had become customary for the defendant's cars in entering the area of repairs from the west to be run slowly and to have their gongs sounded continuously; that the plaintiff's intestate in the course of his duties just had driven a team across the defendant's tracks from one side to the other of the street, had left his team, had returned in the course of his duties to straighten some planks placed near the tracks to make the progress of teams easier, and had stooped down in arranging the planks, when his head was struck by a street car which passed at the rate of about twenty-two miles an hour and of the approach of which no sound of warning was given, that the motorman when two hundred feet distant saw the intestate two or three feet from the track but did not begin to lessen the speed of the car until he was four seconds distant from him, and that, when twenty feet from him, the motorman saw the intestate, who was looking at the car, step back eighteen to twenty inches. *Held*, that there was evidence that the intestate was in the exercise of the due care required by St. 1907, c. 392, as a condition precedent to recovery and that the motorman was negligent.

At the trial of the action described above the evidence as to the practice of the defendant of running its cars slowly and of striking the gong continuously while passing through the area where repairs were being made was admissible, not only to show how the cars were run, but also to show that the intestate knew of the usual method and presumably governed his conduct accordingly.

TORT for causing the death of the plaintiff's intestate, Michael McCue, on July 9, 1912, on Commonwealth Avenue in Boston. Writ dated September 9, 1912.

In the Superior Court the case was tried before *Sanderson*, J. The material facts and the exceptions of the defendant are stated in the opinion. The jury found for the plaintiff in the sum of $6,240; and the defendant alleged exceptions.

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J. T. Hughes, for the defendant.

J. P. Walsh, (*C. J. Muldoon, Jr.*, with him,) for the plaintiff.

PIERCE, J. Culling from the evidence only such facts and inferences of fact or facts as tend to establish or to give credibility to the plaintiff's contention that his intestate was killed through the defendant's negligence while he was in the exercise of statutory due diligence (*Vahey* v. *Bigelow*, 208 Mass. 89, 92), it might have been found that at the time of the accident resulting in the intestate's death workmen were and for a month had been engaged in resurfacing the southerly side of Commonwealth Avenue from a point between Beacon Street and the synagogue to Cottage Farm, a straight course of half a mile with an unobstructed view. In the process of repair trenches and ditches were being dug in the gutter beside the southerly rail of the inbound track at places beneath that track and on the reservation between the two sets of tracks. The work was being prosecuted at the same time over the entire distance, and workmen were engaged in the performance of their several tasks around, upon and beneath the tracks. During the progress of the work, before this accident, it had been the general practice of motormen to run their cars slowly after leaving Cottage Farm Bridge, and to strike the gong, "Bang, bang, right straight along."

The car that struck the intestate was run at the rate of twenty-two to twenty-four miles an hour and its gong was not rung. Teams in the delivery of their loads came in on the northerly side of the avenue and were unloaded at designated places on the southerly side. The intestate brought in his load and crossed the tracks from the northerly side to the southerly side of the avenue at a crossing "for foot passengers and teams." Dumping the load, he drove the team back to the northerly side and left it. Returning to the southerly side he proceeded to readjust a plank which his team in passing over had forced from its position by the side of the southerly rail of the inbound track. When in position this plank was eighteen inches from the rail and served to bridge a drop of six inches between the rail and paving. While thus engaged, stooping over near the rail, his head was struck by the swiftly moving car from which no sound of warning had come.

The evidence fully warranted the submission of the question

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of the defendant's negligence to the jury, and as a common law proposition was equally adequate to justify a jury in finding that no negligent act of the intestate contributed to his harm. The jury also would be justified in finding that the intestate was affirmatively in the exercise of due care, or, otherwise stated, was diligent in self protection against the negligent acts of the defendant. In determining what he should have done we must consider that he had the right to assume on humanitarian grounds that the motorman would not wilfully or recklessly run him down; that he had the right to rely upon the known practice at that place to run the car slowly and to ring the gong where men were seen to be engaged upon, about, or under the track. In the case at bar the motorman saw the intestate near the track, two or three feet away, when the car was two hundred feet distant. He did not start to slow down until the car was one hundred feet away, or, stated in terms of time, less than four seconds distant. When twenty feet away he saw the intestate, who was looking at the car, step back eighteen to twenty inches; he (the motorman) "thought the man was safe," and that there was no necessity to slow down the car.

Upon the defendant's showing, the case at bar was not one where there is no evidence of due diligence, but is one where the degree of self care was properly submitted to the jury. The case is distinguishable from *Dwyer* v. *Boston Elevated Railway*, 220 Mass. 193, and cases therein cited in that in the case at bar the intestate saw the approaching car and stepped back to avoid it; and is like *Santore* v. *New York Central & Hudson River Railroad*, 203 Mass. 437, and *Hanley* v. *Boston Elevated Railway*, 201 Mass. 55. The evidence to which exception was taken was admissible, not alone to show how the cars were in fact run, but to show that the intestate knew of the usual method and presumably governed his conduct accordingly. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 203 Mass. 288.

The exception was a general one and must be overruled. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 384.

Exceptions overruled.

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HERBERT M. SEARS *vs.* INHABITANTS OF NAHANT.

Essex. March 25, 1915. — June 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Tax, Remedy for over-assessment.

An action at law cannot be maintained against a town or city to recover back a part of a tax on the ground of over-assessment, whether the excess in the assessment arose from over-valuation or from the improper inclusion of property not owned by the person to whom the tax was assessed, the exclusive remedy in such a case being a petition for an abatement under R. L. c. 12, §§ 77, 78, now St. 1909, c. 490, Part I, §§ 76, 77.

CONTRACT by one of the four executors of the will of Frederick R. Sears, late of Nahant, to recover the amount of a tax assessed for the year 1909 to such executors and collected by distress upon the property of the plaintiff. Writ dated April 15, 1911.

The case was heard by *Hamilton*, J., upon the pleadings and an agreed statement of facts. The judge ruled that the plaintiff was not entitled to recover, and reported the case for determination by this court. If upon this record the plaintiff was not entitled to recover, judgment was to be entered for the defendant; otherwise, such judgment was to be entered as to this court should seem proper.

B. E. Eames, (*W. C. Rice* with him,) for the plaintiff.

P. Nichols, (*S. H. Hudson* with him,) for the defendant.

RUGG, C. J. This is an action of contract whereby one of the executors of the will of the late Frederick R. Sears seeks to recover from the town of Nahant the tax, or excess above what he contends that the tax ought to have been, levied on the estate for the year 1909, and collected of him as one of four executors. No list of property was filed for that year by the executors at any time. No petition for the abatement of the taxes for that year ever has been filed. It is manifest from the agreed facts that the executors were liable that year to be assessed at least for the property originally held by them as executors, which they had attempted to distribute to themselves as trustees under the will before their accounts as executors had been duly filed, allowed and

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proved in the Probate Court. It has been the law of this Commonwealth for many years that such attempted transfer was ineffectual so far as concerns taxation. *Hardy* v. *Yarmouth*, 6 Allen, 277. See *Welch* v. *Boston*, 211 Mass. 178, where all the earlier cases are reviewed.

The executors in 1909 were taxable under the law in Nahant at the least for the portion of the estate devised to them as trustees. In any event, a part of the tax was legal. *Sears* v. *Nahant*, 215 Mass. 329. Hence on the aspect of the case most favorable to the plaintiff on his own contention, the tax was not wholly illegal but only excessive in amount.

Scarcely any proposition in the law of taxation is more firmly settled than that an action of contract does not lie to recover back any part of a tax too heavy by reason of a simple over-assessment. It is immaterial whether the over-assessment arises either from too high valuation of property actually owned, or by the inclusion of other property not owned for which no tax ought to be levied. The sole remedy in such case is that provided by the statute by way of abatement. That remedy is adequate, plain, complete, and expeditious. It is direct and simple. It affords ample opportunity for hearings before competent and impartial tribunals. It is exclusive. The decisions to this point are so numerous that only a few need be cited. *Howe* v. *Boston*, 7 Cush. 273. *Harrington* v. *Glidden*, 179 Mass. 486. *Glidden* v. *Harrington*, 189 U. S. 255. *Kelley* v. *Barton*, 174 Mass. 396. *All Saints Parish* v. *Brookline*, 178 Mass. 404, 410. *Sears* v. *Nahant*, 208 Mass. 208, 210. It follows that the defendant must prevail.

The other points discussed by the plaintiff are quite irrelevant in view of this decisive barrier which lies across his path.

In accordance with the terms of the report, let the entry be

Judgment for the defendant.

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FREDERICK R. SEARS & others, executors, *vs.* INHABITANTS OF NAHANT.

Essex. March 25, 1915. — June 21, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Tax, Assessment. *Executor and Administrator.*

A previous decision of this court in the present case, reported in 215 Mass. 329, here was affirmed.

The advice of counsel to an executor that he is not required to bring in to the assessors of a town a list of taxable property of the estate of his testator under the provisions of St. 1909, c. 490, Part I, §§ 41, 49, is not as matter of law good cause for a failure of the executor to bring in such a list.

Where the executors of a will also were the trustees thereunder and made a return to the assessors that they had delivered to themselves as trustees a certain amount of personal property, but they had made no distribution to themselves as trustees which had been allowed by the Probate Court, a failure of the assessors of a town to deduct from the tax assessed to such executors the amount assessed to them as trustees on their return to the assessors is not good cause for a failure of the executors to bring in a list of property in accordance with the provisions of the statutes named above, especially where no inventory or account had been filed in the Probate Court by the executors and they persistently had refused to bring in a list of property to the assessors or to give any information as to the total amount of the taxable property received by them as executors and had declined to answer any questions as executors, and where their conduct was calculated deliberately to screen from the observation of the assessors material facts in regard to the property that had come to their hands.

On such facts it was *held*, that a judge of the Superior Court was not required as matter of law to find that the executors had good cause for not bringing in a list of the taxable property in their hands; and that indeed such a finding would not have been warranted, because as matter of law no adequate excuse was shown.

PETITION by the executors of the will of Frederick R. Sears, late of Nahant, under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of that town to abate a tax assessed to the petitioners on December 19, 1910, under St. 1909, c. 490, Part I, § 85, on property omitted from the annual assessment for 1910.

The case was heard by *White*, J., upon an agreed statement of facts and evidence introduced before him showing the facts that

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are stated in the opinion. He found and ruled that the petitioners were not entitled to the abatement sought, and reported for determination by this court the case and all questions of law arising thereon, including the question whether the petitioners had reasonable excuse for their failure to file as executors a list of taxable property for 1910 before June 19, 1911, and for their filing of the list then filed in the form in which it was filed. If the finding and ruling of the judge were correct, the petition was to be dismissed; if they were wrong, such order was to be entered as law and justice might require.

B. E. Eames, for the petitioners.

P. Nichols, (*S. H. Hudson* with him,) for the respondent.

RUGG, C. J. This is a petition for the abatement of taxes assessed for the year 1910 against the executors of the will of Frederick R. Sears. The testator died in June, 1907, having last been a resident of Nahant. The petitioners were appointed executors of his will in July, 1907. Under ordinary circumstances, unless his estate were settled and distributed in accordance with the statutes and due notice given to the assessors of Nahant, it would continue liable to taxation in Nahant for three years, which included the year 1910. St. 1909, c. 490, Part I, § 23, cl. 7.

The assessors of Nahant in accordance with law, St. 1903, c. 157; St. 1909, c. 490, Part I, § 41, gave seasonable notice to all persons to bring in true lists of all their personal estate not exempt from taxation. The petitioners filed no list as executors. They did not comply with the notice. The assessors did not assess any tax against the executors at the time of the regular assessment in 1910, but in December, 1910, acting under St. 1909, c. 490, Part I, § 85, a tax was assessed upon the same valuation of the estate as that made in 1909. The petitioners thereafter in June, 1911, seasonably filed a petition for the abatement of this tax and filed also what purported to be a list of their property subject to taxation, which was in substance a simple statement that they had no such property. This was the first list ever filed by them as executors of the will of Frederick R. Sears, although appointed in the summer of 1907 and having been liable as such executors for a tax on some personal property each succeeding year. They had filed no inventory or account in the Probate Court until March 20, 1911.

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This case was before us in 215 Mass. 329. It there was decided (1) that the tax for 1910 rightly was assessed in December; (2) that since beyond question the tax assessed against the executors for 1908 was a legal tax, and substantially the same tax was assessed in 1909, the assessors were required by the provisions of St. 1909, c. 490, Part I, § 49, to assess against the executors "an amount not less than that last assessed . . . until a true list of" the property subject to taxation "is brought in to the assessors in accordance with the provisions of section forty-one;" (3) that the tax for 1910 was lawful as to its amount.

It is not necessary to review the grounds of that decision upon these points. It expressed the deliberate judgment of the court and is affirmed.

Taking all the facts now disclosed on this record, it is plain that the executors lawfully were taxable in Nahant in 1910, at least for the amount devised to them as trustees. They had not then transmuted this property held by them as executors into property held by them as trustees. *Hall* v. *Cushing*, 9 Pick. 395, 404. It was subject to taxation in their hands as executors, and it would have been the duty of the assessors even if they had known in 1910 all the facts now known, and proper lists had been filed, to have assessed at least that much property to the executors. *Hardy* v. *Yarmouth*, 6 Allen, 277. *Welch* v. *Boston*, 211 Mass. 178.

It was decided in *Sears* v. *Nahant*, 205 Mass. 558, in an opinion written by Mr. Justice Hammond, after an exhaustive review of the colonial, provincial and State statutes and an interpretation of the present law in their light, that the court has no authority to abate a tax where the required list of taxable property was not brought to the assessors within the time specified in their notice, unless the assessors have found or unless the Superior Court has found that there was good cause for the delay, St. 1909, c. 490, Part I, § 76, and that the power of the court on appeal from a decision by the assessors is narrower than that of the assessors themselves. In the case at bar there is no finding by the assessors that there was "reasonable excuse," § 73, or by the Superior Court that there was "good cause," § 76, for the delay by the petitioners in filing the list. The general finding of the Superior Court was that the petitioners were not entitled to an abatement. Although there was no detailed statement of specific findings, the single general

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one involved a finding of all essential subsidiary matters. The failure to make the definite finding of good cause for delay in filing the list, held in *Sears* v. *Nahant*, 205 Mass. 558, to be prerequisite to jurisdiction of the Superior Court to grant an abatement, is equivalent to a finding that there was no good cause or reasonable excuse. Whether or not there is good cause or reasonable excuse is a question of fact dependent upon the specific facts found and the rational inferences to be drawn therefrom. In a proceeding like the present, this court cannot find the facts. It passes only upon questions of law. The case is reported "with all questions of law arising thereon — including the question whether the petitioners had reasonable excuse for their failure to file a list as executors for 1910 prior to June 19, 1911, and for their filing of the list then filed in the form in which it was filed — for the consideration and determination of the full court." This form of report means, when taken in connection with the general finding for the defendant, that the point reported is whether, as matter of law, the finding was wrong.

We are of opinion that such finding was warranted. A brief narration of the salient facts will make this clear. The testator died in June, 1907. The petitioners were appointed executors in the following July. Although it now is agreed that a true inventory was made and sworn to by one of the executors in August, 1907, showing a total value of about $4,200,000, of which about $2,900,000 was taxable property, this was never disclosed to the assessors until it was filed in the Probate Court in March, 1911. Moreover, the assessors in September, 1909, petitioned the Probate Court that the executors be compelled to file an inventory. This petition was opposed by the executors and was dismissed. In May, 1908, a tax on a valuation of $101,500 of personal property was levied against the executors, and the tax on this valuation, amounting to $1,116.50, was paid without protest in August.

In October, 1908, a courteous letter was sent by the assessors to two of the executors, stating that by direction of the tax commissioner of the Commonwealth a tax on $4,000,000 must be assessed, unless a sworn return showing the amount in truth subject to taxation was made. This letter was ignored and no reply was sent. In December, 1908, an additional assessment was made

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in accordance with the statute as to omitted assessments on $4,000,000 of personal estate. A petition for the abatement of this tax was filed on the ground that complete distribution of the estate had been made before May 1, 1908, but no list was presented. This was decided adversely to the executors, 205 Mass. 558. Subsequently, proceedings by mandamus and certiorari to abate this tax were dismissed. *Sears* v. *Nahant*, 208 Mass. 208. In 1909 the executors filed a statement purporting to show a distribution of about $4,100,000 among the legatees under the will, but they declined to file any list as executors and refused to answer any questions touching the property which came to them as executors. The assessors, as they were bound to do under the law, assessed the executors on substantially the same amount in 1909 as they had in 1908. No proceedings for abatement of the 1909 tax were brought, and it was paid under protest. An action at law to recover it back is disposed of in the case just decided, *ante*, 435.

In 1910 again no list was filed by the executors, and substantially the same assessment was made as the year before. That is the assessment now before us. As appears by the facts now in evidence, the executors had in fact distributed in 1908 four sevenths of the estate to legatees as absolute owners, *Carleton* v. *Ashburnham*, 102 Mass. 348, and had attempted to distribute three sevenths to themselves as trustees, without a probate accounting, a thing which they could not do, so as to relieve themselves from taxation. *Hardy* v. *Yarmouth*, 6 Allen, 277. It was well understood by the petitioners and their counsel that it was the contention of the assessors and the tax commissioner of the Commonwealth that there could be no distribution of the estate without an accounting in the Probate Court, and that this contention was based on the express decision to that point in *Hardy* v. *Yarmouth*, 6 Allen, 277. At no time did the assessors do or say anything to mislead the petitioners as to their position and contentions. It would have been perfectly simple for the executors to put the burden of a correct decision of the whole matter upon the assessors by setting forth all the facts in a list or lists true in all their details. Perhaps one as executors would have sufficed. Certainly two, one as executors and one as trustees, would have put the executors in an impregnable position. There

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would have been no stultification in such course (as now is argued), for it has been settled law for almost sixty years that the inclusion of property in a list does not prevent an abatement. *Dunnell Manuf. Co.* v. *Pawtucket*, 7 Gray, 277. *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491, 498.

On the contrary, the petitioners, instead of pursuing these plain provisions of the statutes which would have afforded ample protection against over-taxation, persisted in staking their whole case upon their own view of what ought to be taxed and what the procedure ought to be. That they acted under the advice of counsel does not as matter of law show that they had good cause for refusing to file a list. The statutes were plain. The early decision of the court was plain. The contention of the public officers was clearly explained to the petitioners and was in accordance with the law.

The petitioners argue that there was misconduct on the part of the assessors in failing to deduct from the tax assessed to them as executors the amount assessed to them as trustees on their return. This hardly seems to be warranted. But it quite fails in affording a good cause to the petitioners for not filing a list. In 1910, when the assessors were required to act on the tax now before us, there was nothing to indicate the facts to them with any assurance of certainty. No inventory or account had been filed in the Probate Court by the executors. No list had been filed with them by the executors. There had been the most persistent refusal by the executors as such to file any list or to give any information as to the total amount of taxable property received by them as executors. They had declined to answer any questions as executors. The assessors had no means of knowing that the amount for which the executors were assessed was not less than that which came to the hands of the executors, or that the assessment levied against the executors still was not less than the amount for which they were liable to taxation under the law. The conduct of the executors deliberately was calculated to screen from the observation of the assessors material facts touching the property which had come to their hands. The natural effect scarcely could have been other than to cause the assessors to be wary in acting upon the partial information which the executors chose to disclose. The statement of distribution of the estate

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mailed to the assessors in 1909 did not assert that it was a complete or final distribution.

It has been argued that the list filed by the same persons who were executors, in their capacities as trustees, should be taken as sufficient. But this is not sound. The petitioners drew a sharp distinction between the two capacities, offering to answer questions at one of the hearings solely in their capacity as trustees, and refusing utterly to answer questions as executors. The statutes make a clear distinction between the two capacities as to the *situs* for taxation and otherwise. A different question would have arisen if the executors had brought in a list of property stating all the facts and then leaving the question to be settled by the law as to the capacity in which the property was subject to taxation.

It is certain that the Superior Court judge was not required to find as matter of law that the petitioners had good cause for not filing the list required of them by law in 1910.

If it be assumed that the facts here were all agreed or proved by evidence found to be true, and that, therefore, it is a question of law, *Winnisimmet Co.* v. *Chelsea*, 6 Cush. 477, 481, whether there was good cause for failure to file the list, a like conclusion is reached. Certainly by 1910 it must have become apparent that it hardly could be conceded by the assessors that the executors were not liable as such to a tax in Nahant. No intimation was given by the assessors at any time to the petitioners that they need not file a list as executors. To paraphrase what was said by Mr. Justice Sheldon in *Atlantic Maritime Co.* v. *Gloucester*, 214 Mass. 348, 351: If, in view of the dispute that seemed likely to arise whether the petitioners were taxable as executors, the petitioners desired to be able to appeal from any action that the assessors might take, they must be presumed to have known that they were bound to bring in their true list before they were assessed. "But the decisive fact is that nothing was said or done to lead" the petitioners "to suppose that they were relieved from the duty of bringing in a list" of their property. It was held in that case that "the finding of good cause was not warranted." The facts and presumptions in the case at bar point to this duty resting upon the petitioners quite as strongly as in *Atlantic Maritime Co.* v. *Gloucester*. The conclusion follows that as matter of law no adequate excuse is shown.

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It is unnecessary now to determine whether the list filed in June, 1911, which was a bald denial of the possession of any property, and which was in fact incorrect although supposed by the executors to be right, was a "true list" within the meaning of the statute, even if seasonably filed, or whether under all the circumstances a list which at least fully and frankly stated the whole situation was not required. See *Sears* v. *Nahant*, 215 Mass. 329, 335.

The ground upon which this decision rests renders immaterial and irrelevant the other arguments urged by the petitioners.

Petition dismissed.

JOHN A. AIKEN, executor, *vs.* THOMAS L. COMSTOCK, executor, & others.

Franklin. May 20, 1915. — June 21, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Devise and Legacy, Residuary clause, Lapsed legacy, Intestacy.

A testator who was of advanced years, was familiar with the law and apt and proficient in the power of declaring and expressing his thoughts, at the close of a will drawn by himself and containing many carefully framed provisions giving legacies to many relatives according to a definite plan, provided "In the event of the lapse of any one of these legacies by the death of a legatee, I wish the lapsed legacy to be equally divided between the other members of that branch of the family to which this belonged." The next provision gave the rest and residue of the testator's property "divided into seven equal parts . . . one share each" to seven persons specifically named. One of these seven persons died before the testator without issue surviving. *Held*, that the provision preceding the residuary clause could not be read into it, and that therefore there was an intestacy as to one seventh of the residuary estate.

PIERCE, J. This is a bill in equity for instructions, brought in the Probate Court by the executor of the will of James S. Grinnell, who died on September 4, 1900, at the age of seventy-nine years, leaving a widow, no issue, and sixteen heirs at law. The will, which was drawn and executed by the testator himself, was admitted to probate on October 4, 1900.*

* Ella L. G. Ripley, one of the respondents, appealed from the decree of the Probate Court. Pending the determination of the case on appeal, she died and Thomas L. Comstock, the executor of her will, was admitted as a party to prosecute the appeal in behalf of her estate.

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At the date of the will the testator was seventy-four years of age. He had been a member of the bar and in his early life a practitioner of the law at Greenfield, Massachusetts. In the sixties he became a clerk in the department of Agriculture at Washington, and subsequently was the chief clerk of the Patent Office there. In the eighties he retired from the Patent Office and returned to Greenfield, where he lived the life of a country gentleman interested in the civic concerns of the town and devoted to agriculture, of which he was an enthusiastic patron in his private life. He was a member of the State Board of Agriculture and a trustee of the Massachusetts Agricultural College. He was a lover of books, and his library was extensive and varied.

His widow, Katherine R. Grinnell, died on December 29, 1913, without issue, and leaving a will which was duly allowed. Among the heirs and legatees of James S. Grinnell were a sister, Ella L. G. Ripley, a brother, and nineteen nephews and nieces.

In the disposition of his property he gave to his sister a home for life, an annuity of $300, and a legacy which by reason of the death in the lifetime of the testator of a co-legatee became $10,000. To all and to every nephew and niece and to a deceased nephew's wife legacies were given. To three of them was given as great a sum as $8,000; to no one was less given than $200. In the scheme of the will there was given, with a single exception, a like sum to each member of the branch of which a brother or sister was the parent stock, although the members of each branch did not always receive the same gift as the members of some other branch. To the brother nothing was given directly, the testator providing for gifts to the brother's children and to the wife of a deceased son, in manner and method similar to gifts to the children of deceased brothers and sisters.

The testator then provided that "In the event of the lapse of any one of these legacies by the death of a legatee, I wish the lapsed legacy to be equally divided between the other members of that branch of the family to which this one belonged." The possibility that all property had not been entirely disposed of led to this provision which immediately followed that above quoted: "The rest of my property if there be any not appropriated in this will I wish divided into seven equal parts and distributed as follows to wit one share each" to seven persons specifically named.

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Among these residuary legatees was Elsie L. Comstock, a niece, who died without issue surviving before the death of the testator.

No one seriously claims, nor could any one properly claim, that the residuary legatees took as a class. *Sohier* v. *Inches*, 12 Gray, 385. *Best* v. *Berry*, 189 Mass. 510. The appellant contends that the seventh share bequeathed to Mrs. Comstock did not lapse at her death, but by reason of the provision relating to lapsed legacies devolved upon her as the sole representative of that branch of the family to which Mrs. Comstock belonged. The judge of probate refused to adopt this construction and decreed "that said one-seventh part of the residuary estate of said testator is intestate property and to be distributed to the heirs at law of said James S. Grinnell." From this decree the appellant appealed to this court.*

The phrasing of the will clearly demonstrates that the testator was not only familiar with the law but was apt and proficient in the power of declaring and expressing thoughts, wishes and purposes through the medium of the written word. He specially provided against the contingency of death and lapsing in the branch of his deceased sister Harriet McCulloch's family. After he had (as he apparently thought) disposed substantially of all his property he made the general provision providing for the contingency of death and lapsing of legacies.

The very next clause provides for any residuary estate.

He could not have failed to have in mind, when drawing this final provision, that there was the same ever present contingency of death, lapsing and intestacy that attached to all other gifts against which he had solicitously guarded. It is not given to us to read into the residuary clause the preceding clause because we think the testator forgot to do so or thought he had done so, when so far as we know or can ascertain from the terms of the manifestly carefully drawn will the omission was designed.

It follows that the decree of the Probate Court must be affirmed.

So ordered.

The case was submitted on briefs.

S. D. Conant, for Thomas L. Comstock, executor.

E. L. Shaw, for Laura M. Moir and Anna W. Russell.

* The case was reported by *Crosby*, J., upon the bill, answers and appeals for determination by this court.

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GWILYM THOMAS *vs.* SUSAN M. LANE.

Middlesex. January 19, 1915. — June 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Of one controlling real estate. *Landlord and Tenant*, Liability of landlord to tenant's invitee.

A landlord, who gratuitously promises a tenant that he will make certain repairs upon the demised premises and makes such repairs negligently, although, under the doctrine of *Gill* v. *Middleton*, 105 Mass. 477, he is liable for injuries to his tenant caused by such negligence, is not liable for an injury to an invitee of the tenant to whom the gratuitous promise was not made and to whom the landlord owed no duty in the matter.

TORT for personal injuries sustained by the plaintiff on the evening of September 8, 1912, in the manner and under the circumstances described in the opinion by reason of the giving way of a hand rail at the side of the front steps of the house numbered 33½ on Inman Street in Cambridge belonging to the defendant. Writ dated September 30, 1912.

In the Superior Court the case was tried before *Brown*, J., who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant and with the assent of the parties reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment should be entered on the verdict for the defendant; otherwise, that judgment should be entered for the plaintiff in the sum of $2,000.

W. V. Taylor, for the plaintiff.

W. B. Luther, for the defendant.

LORING, J. The plaintiff in this action was walking on Inman Street in Cambridge during the evening of September 8, 1912. As he passed the house numbered 33½ on that street, one Eisenhauer, who was sitting on the front stoop, invited him to come up and sit down a while. Thereupon the plaintiff went up to the top of the front steps, some eight in number, shook hands with Eisenhauer and put his hand upon a hand rail at the side of the steps. The hand rail gave way and the plaintiff fell to the ground with

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it. The plaintiff's wrist was broken and this action was brought by him against Eisenhauer's landlord to recover compensation for that injury.

The house in question belonged to the defendant, but it and the whole of it had been let by her to Eisenhauer six months before the accident. At the trial the plaintiff proved that some three or four months before the accident the brother of Eisenhauer's wife fell off the steps of the house through the giving way of the rail substantially as it did when the plaintiff met with the accident here in question. At that time Eisenhauer's wife complained to the general agent of the defendant, and the defendant's agent undertook to repair the railing. There was evidence that there was negligence in making the repairs which the defendant's agent undertook to make, and the plaintiff seeks to recover from the landlord under the doctrine of *Gill* v. *Middleton*, 105 Mass. 477.

The defendant in effect has contended that the decision in *Gill* v. *Middleton* is in conflict with the subsequent cases of *McLean* v. *Fiske Wharf & Warehouse Co.* 158 Mass. 472, *Kearines* v. *Cullen*, 183 Mass. 298, *Galvin* v. *Beals*, 187 Mass. 250, *Phelan* v. *Fitzpatrick*, 188 Mass. 237, *Dalton* v. *Gibson*, 192 Mass. 1, *Rolfe* v. *Tufts*, 216 Mass. 563, and is no longer law. With the possible exception of a statement made in *Galvin* v. *Beals*, 187 Mass. 250, 252, there is nothing that even gives countenance to this contention. Mr. Justice Lathrop, in *Galvin* v. *Beals* said: "The general rule in this Commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, and makes the repairs, and is negligent in making them." After stating that this is the "general rule" in this Commonwealth, Mr. Justice Lathrop on the next page deals with the exception to the general rule (although he did not speak of it as an exception) created by the decision in *Gill* v. *Middleton*. He there pointed out that the plaintiff in the case of *Galvin* v. *Beals* had not brought herself within the exception to the general rule created by *Gill* v. *Middleton* because there was no evidence in that case that the landlord (who was the defendant in *Galvin* v. *Beals*) undertook to repair that part of the demised premises which gave way and caused the accident to the plaintiff. The rule in *Gill* v. *Middleton* was ap-

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plied in the subsequent cases of *Riley* v. *Lissner*, 160 Mass. 330; *Buldra* v. *Henin*, 212 Mass. 275; *McLeod* v. *Rawson*, 215 Mass. 257; it was referred to as law in *Dix* v. *Old Colony Street Railway*, 202 Mass. 518, 523; *Stewart* v. *Cushing*, 204 Mass. 154, 157; *Rolfe* v. *Tufts*, 216 Mass. 563, 566. It must be taken to be the law of the Commonwealth.

We assume that on the facts stated above (if there had been no other facts in the case at bar) Eisenhauer could have recovered against his landlord under the doctrine of *Gill* v. *Middleton* if he and not his invitee had been the person injured. But the question presented in the case at bar is whether the plaintiff, who went up the steps and used the railing upon Eisenhauer's invitation, can recover from Eisenhauer's landlord.

It is plain that the case at bar does not come within the doctrine of *Domenicis* v. *Fleisher*, 195 Mass. 281. The doctrine of *Domenicis* v. *Fleisher* applies to cases where the landlord is under an obligation to keep common passageways (remaining in his control), or to keep demised premises otherwise in control of the tenant in a safe condition for the use of the tenant and those entering the premises under the tenant's right. The distinction between a covenant or agreement to keep premises in a reasonably safe condition for the tenant (and those entering under the tenant's right) on the one hand and on the other hand a covenant or agreement to make all necessary repairs upon premises is pointed out and explained in *Miles* v. *Janvrin*, 196 Mass. 431, 433, and again in *Flanagan* v. *Welch*, 220 Mass. 186, 192.

We come therefore to the question whether a landlord who gratuitously undertakes to repair demised premises and does it negligently is liable under the doctrine of *Gill* v. *Middleton*, *ubi supra*, to any one but the other party to the contract by which the landlord undertakes (gratuitously) to make the repairs which are negligently made.

Tuttle v. *Gilbert Manuf. Co.* 145 Mass. 169, was a case in which the landlord had failed for an unreasonable time to make specific repairs which he had agreed to make upon the demised premises and in consequence of his failure the tenant had sustained personal injuries for which he undertook to hold the landlord liable. In deciding that the landlord in that case was not liable under those circumstances it was said by this court that if an ac-

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tion had been brought against a third person who had contracted to make the repairs which the landlord had agreed to make and the third person had delayed performing the contract for an unreasonable time, the plaintiff could not have recovered from him compensation for personal injuries suffered by reason of the failure to make the repairs. And it was held that the liability of a landlord who had agreed to make repairs and had delayed making them for an unreasonable time stood on the same footing as that of a third person who had made such a contract and had been guilty of unreasonable delay in performing it. We are of opinion that the same reasoning applies in the case at bar and that where a landlord gratuitously or for hire undertakes to make repairs upon demised premises he is under no greater liability in case the repairs are negligently made than a third person would have been if a third person had undertaken to make the same repairs either gratuitously or for hire and had made them negligently.

Upon the question whether a third person under these circumstances is liable to any one but the other party to the contract, *Winterbottom* v. *Wright*, 10 M. & W. 109, is the leading case. That was a case in which the defendant had undertaken to provide the Postmaster General with a mail coach in which to carry the mails and the plaintiff, who had been employed to drive the mail coach, was injured through the breaking down of the coach from what would have been negligence in its maintenance or construction if any duty in the premises had been owed by the defendant to the driver. It was held that, the plaintiff not being a party to the contract by which the defendant had undertaken to provide a safe coach, no duty was owed by the defendant to him in the premises, and that he could not recover, although the defendant had performed his contract with the Postmaster General in a negligent way.

Winterbottom v. *Wright* has been cited with approval in *Albro* v. *Jaquith*, 4 Gray, 99, 102, *Davidson* v. *Nichols*, 11 Allen, 514, 520, *Osborne* v. *Morgan*, 130 Mass. 102, 104, and is the law of the Commonwealth. See *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341. Cases in other jurisdictions affirming the doctrine may be found below.*

* *Savings Bank* v. *Ward*, 100 U. S. 195. *Losee* v. *Clute*, 51 N. Y. 494. *Marquardt* v. *Ball Engine Co.* 122 Fed. Rep. 374. *McCaffrey* v. *Mossberg &*

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There was no evidence in the case at bar to bring this case within the limitation of the doctrine of *Winterbottom* v. *Wright*, founded upon the proposition that when a defendant knowingly sets a dangerous article in motion he is liable, as to which see *Lebourdais* v. *Vitrified Wheel Co. ubi supra*, 343.

It remains to consider the fact that in *Gill* v. *Middleton* the wife of the tenant recovered compensation for injuries suffered by her. Although that must be taken to be the fact in *Gill* v. *Middleton*, it is a fact which was not discussed by this court in deciding that case. So far as *Gill* v. *Middleton* is an authority for the right of the wife of that tenant to recover compensation for injuries suffered by her (through the negligence of the landlord who had undertaken gratuitously to make repairs) it must be taken to be an authority depending upon the special circumstances of that case. The statement in the report is that "These facts appeared: . . . The privy was out of repair, and the plaintiffs requested the defendant to put it in repair. He said that he would do so, and accordingly made some repairs on it, himself, with the aid of a common laborer; and, after finishing them, he told Mrs. Gill that he had made it safe, so that she need not fear to use it." It appears, therefore, that in that case the undertaking of the landlord to put the privy in repair was an undertaking not with the tenant alone but an undertaking with the tenant and his wife; and further that the defendant landlord recognized that his undertaking was an undertaking with the wife as well as with the tenant by giving her the assurance ("after finishing them") "that he had made it safe, so that she need not fear to use it." In addition to this the right of the wife to recover in *Gill* v. *Middleton* was put on this ground in the charge under which the verdict in favor of the wife was found. The presiding judge instructed the jury in these words: "If the jury are satisfied, from the evidence, that the defendant agreed to assume the repair of the privy, and did in fact repair the same himself, and thereafter assured the female

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Granville Manuf. Co. 23 R. I. 381. *Heizer* v. *Kingsland & Douglass Manuf. Co.* 110 Mo. 605. *O'Neill* v. *James*, 138 Mich. 567. *Zieman* v. *Kieckhefer Elevator Manuf. Co.* 90 Wis. 497. *Marvin Safe Co.* v. *Ward*, 17 Vroom, 19. *Curtin* v. *Somerset*, 140 Penn. St. 70. *Cobb.* v. *Clark Co.* 118 Ga. 483. *Sawyer* v. *Minneapolis & St. Louis Railway*, 38 Minn. 103. *Heindirk* v. *Louisville Elevator Co.* 122 Ky. 675.

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plaintiff that the same was safe and in good repair, but in point of fact the same was not put in safe repair, by reason of the want of ordinary skill or care in the workmanship or selection of materials on the part of the defendant, and the female plaintiff, relying on the said assurance of the defendant, and using due care herself, was injured, then the plaintiffs may recover." And this court adopted that when it said at the end of the opinion: "The jury under proper instructions have found the defendant guilty of culpable negligence, and accordingly the exceptions are overruled." The decision in *Gill* v. *Middleton* that the wife of the tenant in that case could recover compensation for injuries suffered by her through the landlord's negligence in making the repairs which he undertook gratuitously to make depended upon the peculiar facts of that case, and that case is not an authority for the proposition that in the ordinary case where a landlord undertakes gratuitously to make repairs for his tenant any duty arises on the part of the landlord to persons other than the tenant.

For these reasons we are of opinion that the plaintiff, being an invitee of the tenant, had no right of action against the defendant (the landlord) by reason of the fact that the repairs which she through her general agent had undertaken to make in the railing were made negligently; and that this is so because the landlord under the circumstances of the case at bar owed no duty in the matter to the tenant's invitee.

It follows under the terms of the report that judgment must be entered on the verdict for the defendant; and it is

So ordered.

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EMELINE F. SPORT & another, petitioners.
EMELINE F. SPORT *vs.* BOSTON ELEVATED RAILWAY COMPANY.
HENRY SPORT *vs.* SAME.

Middlesex. March 16, 1915. — June 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Practice, Civil, Exceptions, Stipulations of counsel. *Evidence,* Materiality.

Where, in an action against a street railway company for personal injuries, a letter containing a statement by an attorney at law acting for the defendant referring to a decision of the plaintiff not to receive $50 offered to him by the defendant, which was inadmissible because it was a part of a proposed compromise, was put in evidence by the plaintiff with the assent of the counsel for the defendant on the condition that he should be "allowed to state the facts in connection with it which it refers to," and the plaintiff's counsel then said, "Anything that letter opens up you can explain perfectly," an exception afterwards cannot be taken by the plaintiff to evidence introduced by the defendant to explain that an offer to pay the plaintiff $50 was made upon the basis that the defendant was not responsible for the accident, this being within the stipulation of counsel under which the admission of the incompetent evidence was assented to.

In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the defendant's servants, where the conductor who was in charge of the defendant's car at the time of the accident has been called as a witness by the defendant, the plaintiff cannot ask him on his cross-examination, what experience the motorman who was operating the car at the time of the accident had had, the inexperience of the motorman, if shown, not being material upon the issues whether he was negligent and whether his negligence caused the plaintiff's injuries. Following *Lang* v. *Boston Elevated Railway,* 211 Mass. 492.

LORING, J. From the report of the commissioner * in these two cases it appears that two actions had been brought against the Boston Elevated Railway Company, the first by Emeline F. Sport to recover compensation for physical injuries suffered by her and the second by Henry Sport, her husband, to recover for expenses incurred by him in connection with the injuries suffered by the plaintiff in the principal action. The two cases were tried together.†

* Appointed on the petition of the two plaintiffs to prove exceptions disallowed by the judge.

† Before *Morton,* J. The declarations alleged that the injuries of the plaintiff in the first case were caused by the negligence of the defendant's

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At the trial P. F. Drew, Esquire, counsel for the railway company, asked the plaintiff in the principal action on cross-examination whether former attorneys employed by the plaintiffs had withdrawn their appearance in the two actions in question, and the plaintiff in the principal action said that they had. He then asked her whether those attorneys had told her before withdrawing from the case that they had a talk with a police officer who was on the car and had seen the accident and that it was after they had talked with the police officer that her attorneys had withdrawn from the case; and lastly whether that was what the former attorneys told her before they withdrew, and she said that that was the fact.

On redirect examination C. G. Morgan, Esquire, counsel for the plaintiffs, offered a letter which had been written by the former attorneys to the plaintiff in the principal action in which they stated that they had received a letter from that plaintiff stating in effect that she had decided not to receive the $50 offered by the Boston Elevated Railway Company and that in consequence of that action taken by that plaintiff they had notified the railway company of her answer and had withdrawn their appearance. When this letter was offered by Mr. Morgan, Mr. Drew said "Perfectly willing that should be offered if I am allowed to state the facts in connection with it which it refers to." Thereupon the presiding judge asked Mr. Morgan this question: "Had you better put that in?" to which Mr. Morgan answered: "Yes, your honor." The presiding judge then said: "Of course it opens the door to Mr. Drew to say 'I want that clause explained.'" Thereupon Mr. Morgan said: "I want to let you know just what I offer to prove. Anything that letter opens up you can explain perfectly." To this Mr. Drew said "Very well." Then the letter was introduced in evidence. Later Mr. Drew called one Maurice F. Spillane, Esquire, an attorney of the railway company. He testified that he made an offer to the plaintiff in the principal case of $50 in settlement, and when he made it he told the former attorneys of the plaintiff that the railway company settled cases to get rid of trying them, and for that reason he had offered $50 in the case

servants. There was no allegation that the defendant was negligent in employing unfit or incompetent employees. The jury returned verdicts for the defendant.

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here in question. After this testimony had been given Mr. Drew asked the witness what was said in that conversation in reference to the question of liability and to this question Mr. Morgan objected. The presiding judge said: "You may put the question, what was said between you in regard to the question of liability." To that Mr. Morgan asked to have an exception saved, and the presiding judge said: "The exception is not allowed; Mr. Morgan, you had full notice before these letters were put in as to the explanation that would be offered, and stated at the time that anything could be offered on the matter in the way of explanation that was desired." Thereupon the witness testified that $50 was offered on the basis that the railway company was not responsible for the accident.

A bill of exceptions stating in substance the facts as found by the commissioner was disallowed by the presiding judge in these words: "I consider that no exception was saved and the exception claimed is disallowed."

The contention which the learned counsel for the plaintiff now makes is that his statement "anything that the letter opens up you can explain perfectly" was not in fact and could not have been taken by the presiding judge to have been an assent on his part to the terms stipulated for by Mr. Drew when the letters were offered in evidence. His contention is that on the contrary this statement of his was intended to be and must have been understood by the judge to have been intended by him to be a statement that he insisted upon his legal rights in the matter. He contends that he was within his legal rights when he offered the letters and that it follows that the judge in ruling that he had agreed to the admission in evidence of the explanation which was subsequently admitted by him misunderstood what he had said and that he had an exception to the testimony of Spillane.

The fundamental difficulty with this contention on the part of the plaintiffs' counsel is that he had no right to put in evidence these letters in redirect examination of the plaintiff in the principal case. The letters disclosed an admission of liability on the part of the railway company and it appears that that admission of liability was part of a compromise and for that reason the letters were not admissible.

The case, therefore, comes down to one where a letter not

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admissible because it contains an admission of liability which was part of a compromise, was admitted under a stipulation that the other side should be allowed to show the fact that the admission of liability was part of an agreement for compromise. No other construction fairly can be given to the stipulation which was asked for by Mr. Drew when the letters were offered and under the circumstances the statement made by Mr. Morgan must be taken to have been an assent to that stipulation asked for by Mr. Drew. Whatever Mr. Morgan may have intended to state, what he did state was an assent to the stipulation and was properly so treated by the presiding judge. It follows that the evidence of Mr. Spillane was within the stipulation which was agreed to by Mr. Morgan and the plaintiff is not entitled to an exception.

There was another exception which the commissioner found was taken. The commissioner found that the judge's attention was not especially called to this second exception at the time he made his certificate. The commissioner reported that the second exception ought to be established.*

The second exception is covered by the case of *Lang* v. *Boston Elevated Railway*, 211 Mass. 492.

The entry must be that: The petition is dismissed so far as the first exception is concerned. So far as the second exception is concerned the petition is allowed, the exception is established and it is overruled. It is

So ordered.

C. G. Morgan, for the petitioners and plaintiffs.

P. F. Drew, (*W. U. Friend* with him,) for the respondent and defendant.

* This exception was as follows: The defendant called as a witness the conductor who was in charge of the car at the time of the accident. The plaintiffs asked this witness on cross-examination what experience the motorman who was operating the car at the time of the accident had had as a motorman to the witness's knowledge. The judge excluded the question, and the plaintiffs excepted

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JAMES E. GAFFNEY, administrator, *vs.* BAY STATE STREET RAILWAY COMPANY.

Plymouth. March 23, 1915. — June 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Practice, Civil, Exceptions. *Negligence,* Causing death.

At the argument of exceptions alleged by the defendant in an action of tort after a verdict for the plaintiff, where the question is whether there was any evidence on which the jury could find for the plaintiff on the issues of fact on which the rights of the parties depend, it is out of place for the counsel for the defendant in his argument to compare the number of witnesses who testified in favor of the defendant and the character of the testimony given by them with the number who testified for the plaintiff and the character of their testimony.

At the trial of an action against a street railway company by an administrator for the benefit of the next of kin of his intestate to recover the penalty imposed by St. 1906 c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1, for negligently causing the death of the intestate (before the enactment of St. 1914, c. 553) when he was in the exercise of due care and was not a passenger or in the employ of the defendant, where it appears that the intestate by the invitation of the owner of a tip cart was sitting with such owner and another guest on a board placed as a seat across the tip cart, which was being driven by the owner who had driven horses for fifty years, that just before the cart came to a corner of two streets where there was a single track of the defendant the intestate looked through a gap behind the building on the corner in the direction from which came the car that killed him, and that before the cart could be driven clear of the track it was struck by the defendant's car, which was from seven to twelve minutes late and was going at the rate of twenty miles an hour without sounding any gong or whistle, and the intestate was killed, it was *held,* that there was evidence for the jury that the intestate was actively looking out for his personal safety and thus was in the exercise of due care within the meaning of the statute.

TORT by the administrator of the estate of Frank H. Gaffney, late of Whitman, under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1, to recover for the benefit of the minor children of the intestate, who were his next of kin, the penalty imposed by that statute for negligently causing the death of the intestate on October 25, 1913, when he was in the exercise of due care and was not a passenger or in the employ of the defendant. Writ dated December 8, 1913.

In the Superior Court the case was tried before *Morton,* J. The

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facts which could have been found in favor of the plaintiff upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. There is no evidence that the plaintiff's intestate was in the exercise of due care, and your verdict must be for the defendant.

"3. There is no evidence of negligence on the part of the defendant, and the plaintiff is not entitled to recover.

"4. The fact, if it be a fact, that the plaintiff's intestate, somewhere on Bedford street, between Wheeler's house and Musick's store, turned his head to the right toward Whitman and looked in that direction is no evidence that he was looking for a car, and constitutes no evidence of due care on his part.

"5. Upon all the evidence in this case, if you find that, while on Bedford street between Wheeler's house and Musick's store, the plaintiff's intestate turned his head to the right toward Whitman and looked in that direction, it is mere conjecture that he was looking for a car, and is no evidence of due care on his part with respect to this accident."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $4,992.12. The defendant alleged exceptions.

The case was submitted on briefs.

Asa P. French, for the defendant.

J. J. Geogan & F. J. Geogan, for the plaintiff.

LORING, J. The jury were warranted in finding the following to be the facts in the case. The plaintiff's intestate was returning from work (on the invitation of one Poole) in a tip cart belonging to Poole. Poole, one Keating and the intestate were seated on the tail board laid across the cart as a temporary seat, in the order named, Poole being seated on the nigh side. One McCraith was standing behind the intestate with his hand upon his shoulder. The accident happened some thirty-five minutes after the sun had set, rain was falling, and it was foggy at the time. Poole, the owner of the cart, had driven horses for some fifty years and was driving at the time. The cart was being driven north on Bedford Street in the town of Whitman. Bedford Street crosses Temple Street at right angles, and on the southerly side of Temple Street

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was a single track belonging to the defendant. As the tip cart came out of Bedford Street the horse was going at a walk and was "just stepping across the southerly rail of the car track" when a double truck car of the defendant came upon them, going west at the rate of twenty miles an hour. The arc light was not on, and no gong or whistle was sounded. "The horse stamped her forelegs down upon the track. McCraith said there was a car coming, and then she took a second step and took the north rail." Poole "slashed the horse for all I [he] was worth and spurred her on," but the car struck "the hub of the wheel and the rim of the wheel," and the intestate was killed. The car was from seven to twelve minutes later than the usual time at which it passed the crossing of these two streets. There was a building ("Musick's store") on the southeast corner. From the front line of the store to the southerly rail it was twenty and one half feet, and from the axle of the cart to the nose of the horse, just short of twelve feet.

The defendant asked for five rulings which the judge refused to make.

In his argument the learned counsel for the defendant has compared the number of witnesses who testified in favor of the defendant, and the character of the testimony given by them, with the number who testified for the plaintiff and the character of their testimony. Such an argument is proper on a hearing to set aside a verdict. But it is out of place where (as here) the question is whether there was any evidence on which the jury could find for the plaintiff on the several issues of fact on which the rights of the parties depend. He has also argued (largely basing this argument upon that to which we have just adverted) that there was no evidence warranting a finding that the arc light was not lighted and that neither the gong nor the whistle was sounded. But we are of opinion that there was.

On the facts stated above there can be no question of the jury being warranted in finding negligence on the part of those in charge of the defendant's car.

This is an action for a penalty imposed for negligently causing the death of the plaintiff's intestate. In such a case the allegation that the intestate was in the exercise of due care or "due care and diligence" (to quote the words originally used) have the

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meaning that these words had in an indictment for negligently causing death. *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510. *Bothwell* v. *Boston Elevated Railway*, 215 Mass. 467. *McCue* v. *Boston Elevated Railway, ante*, 432. Those words in an indictment do not have the meaning that they have when it is alleged in a common law action of tort that the plaintiff was in the exercise of due care. In a common law action of tort they mean that the plaintiff's negligence did not contribute to the injury complained of. In an indictment and in an action of tort to recover a penalty for negligently causing death they mean that the deceased was actively looking out for his personal safety. In the case at bar it was enough to prove that allegation that the plaintiff's intestate was riding as an invitee in a tip cart driven by a man who had driven horses for fifty years. In addition it appeared that just before the cart came to Musick's store on the corner of the two streets the intestate looked through a gap behind the store, in the direction from which the car which killed him came. It is true that at the rate this car was going it would have gone by the crossing where the accident occurred if it had been in sight when the intestate looked. But this was or could have been found by the jury to have been evidence that the intestate was actively looking out for his personal safety and so was in the exercise of due care within the meaning of those words in St. 1906 c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1.

St. 1914, c. 553, does not apply to this case.

The result is that all the rulings asked for by the defendant were properly refused, and the exceptions must be overruled. It is

So ordered.

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CHARLOTTE M. CROSBY *vs.* MUTUAL BENEFIT LIFE INSURANCE COMPANY, GEORGE A. WHITNEY, administrator, claimant.

Suffolk. March 25, 1915. — June 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Insurance, Life: change of beneficiary. *Evidence,* Declarations of deceased persons, Opinion.

In an action by a woman, named as the beneficiary in an insurance policy and there designated as the "affianced" of the insured, against the company upon the policy, the administrator of the estate of the insured was summoned as an adverse claimant and contended that the designation of the plaintiff as beneficiary had been changed. There was evidence tending to show that the plaintiff had been told of the policy by the insured and that he had read it to her and had sent to her the premium receipts up to the time of his death; that two years before his death he had applied to the company for a loan on the policy and had been told that to get the loan he would have to have the consent of the beneficiary; that thereupon he made a certificate that he was the sole owner of the policy, and a false affidavit that the beneficiary was dead, filed it with the company and procured the loan; that during his last illness he had told two persons that the plaintiff was the beneficiary of the policy and had told one of them to see that she got its proceeds, at that time explaining as to the false affidavit that "he simply had to do something in order to get that money at the time." *Held,* that a finding was warranted that the certificate and affidavit were not intended by the insured to operate as a change of beneficiary; and that they did not so operate as a matter of law.

In the action described above, the statements of the insured during his last illness, which tended to show that he did not intend to revoke the designation of the plaintiff as the beneficiary of his policy, were *held* to be admissible as the declarations of a deceased person under R. L. c. 175, § 66.

In the same case, a declaration of the insured, "If anything does happen to me, I have had my life insured and Charlotte [the plaintiff] will have that anyway," which was admissible as showing his intention, was *held* to be a statement of fact and not incompetent as expressing an opinion on a past transaction.

CONTRACT upon a policy of insurance issued by the defendant upon the life of one Frank P. Whitney for the benefit of the plaintiff. Writ dated May 28, 1914.

Before the trial, the defendant filed a petition of interpleader and the administrator of the estate of Frank P. Whitney was summoned as an adverse claimant and filed an answer.

The case was heard by *Chase,* J., without a jury. The provision in the policy relating to a charge of beneficiary was as follows:

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"If not assigned, this Policy may be returned to the Company at its office in Newark, New Jersey, with the insured's written request for the appropriate indorsement of the policy by the Company:

"1. To have the Beneficiary changed. This change may be made at any time, and from time to time, while the policy is in force, or within one month from default in premium-payments."

The other material evidence and the exceptions of the claimant are described in the opinion.

The judge found for the plaintiff; and the claimant alleged exceptions.

F. G. Cook, (*G. H. Hull* with him,) for the claimant.

T. C. Batchelder, for the plaintiff, was not called upon.

LORING, J. At the trial the claimant asked for thirteen rulings and took an exception to the judge's refusal to grant them. The only one of these exceptions which has been argued is that to the judge's refusal to rule that on all the evidence the plaintiff was not entitled to recover. We treat the other exceptions as waived.

The facts which the judge was warranted in finding were as follows. In 1910 one Frank P. Whitney took out a policy on his life payable to the plaintiff, "his affianced if living, otherwise to the executors, administrators or assigns of the insured." In February, 1912, being in need of $400, Whitney applied to the insurance company for a loan to that amount. He was told by the company that they would not make the loan "unless he got permission from the beneficiary." Whitney, being in a position where he had to have the $400, thereupon made a false affidavit that the beneficiary was dead and signed a loan certificate in which it was stated that he was the "sole owner" of the policy and delivered the false affidavit, the certificate and the policy to the company. The company indorsed upon the policy a memorandum of the loan and returned it to Whitney.

It appeared that when Whitney took out the policy he told the plaintiff that it was payable to her and read the policy over to her. It had been his custom to hand to her, or send to her through the mail, the receipts for premiums when they were paid. There were two premiums due after the loan of $400 mentioned above, which were paid by Whitney. The receipts for these payments were sent by Whitney to the plaintiff. Whitney died on April 28, 1914.

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During his last illness he told two persons that the plaintiff was the beneficiary of this policy and he asked one of them (his clerk) to see that she got the proceeds of it. Being taxed at this time with the false affidavit he at first denied it, but later on said: "I couldn't get the money unless I signed that; . . . he [I] simply had to do something in order to get that money at the time."

The judge made the following finding of fact: "The certificate and statement were not intended by the insured to operate to change the beneficiary, or to terminate the expectancy of said Crosby therein; but he still intended that the policy should be payable to her, and made the false statement of her death without her knowledge or consent in order to obtain the loan from the company without her signature, which would otherwise have been required by the company."

It is plain that on the evidence the finding of the judge that Whitney did not intend to change the designation of the plaintiff as beneficiary of the policy was warranted. Had Whitney been willing to end the plaintiff's expectancy as beneficiary of the policy there would have been no difficulty in getting the loan. Whitney had a right to change the beneficiary and in that way to end the expectancy which the plaintiff had in the policy. That would have been the easiest way for him to get the loan. His resort to the false affidavit (in order to get the loan) can be explained only on the ground that he did not wish to revoke the plaintiff's expectancy as beneficiary of the policy. The fact that he did not intend to revoke the plaintiff's interest as beneficiary is confirmed by what he said during his last illness to the two witnesses mentioned above.

It is also plain that there was nothing in the transaction which operated to revoke the designation of the plaintiff as the beneficiary of the policy contrary to Whitney's intention. What took place was that to secure the loan from the company without revoking the designation of the plaintiff as beneficiary or getting her consent to the loan, Whitney secured the loan by falsely representing to the company that the plaintiff had died and that in that way the designation of the plaintiff as beneficiary had come to an end. All that the plaintiff claims is the proceeds less the loan. It is not necessary to consider what the result would have been had she claimed the whole proceeds.

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We have examined the cases cited by the claimant and find none requiring special notice.

In addition to the exception to this ruling the claimant excepted to the admission in evidence of statements made by Whitney during his last illness, as set forth above. If Whitney had been alive and had gone on the witness stand he could have testified to his reasons for making the false affidavit. The reason why he did it tended to show that he did not intend to revoke the designation of the plaintiff as beneficiary of the policy. Whitney being dead, these statements were admissible under R. L. c. 175, § 66.

The claimant has objected to the following statement of Whitney, testified to by one of the witnesses, on the ground that it was expressing an opinion on a past transaction: "If anything does happen to me, I have had my life insured and Charlotte will have that anyway." We think that this is a statement of fact and is admissible as such. The entry must be

Exceptions overruled.

JOHN CONSTANTINO *vs.* MASSACHUSETTS ACCIDENT COMPANY.

Berkshire. May 18, 1915. — June 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Insurance, Accident. *Notice. Evidence,* Presumptions and burden of proof.

Where a policy of accident insurance provides that the insurer's liability shall be limited, in case the insured changes his occupation to one rated as more hazardous in a certain manual showing a classification of risks, to such an indemnity as according to the manual the premium paid would purchase in the more hazardous occupation, and, at the trial of an action for indemnity under the policy, the insurer contends that the insured made such a change, the burden of establishing the fact that the new occupation was more hazardous than the old is upon the insurer and, where the evidence is not undisputed, it is proper for the presiding judge to refuse to rule that that burden is sustained.

Where, at the trial of an action against an insurance company upon a policy of accident insurance, the defendant contends that the notice in writing of the plaintiff's injury required by the provisions of the policy was not given, and there is evidence tending to show that the plaintiff saw an agent of the company, who on a previous occasion had sent a similar notice to the company for the plaintiff and who, because the plaintiff could not write, agreed to send the requisite notice in writing, that all that was required was a filled in form of

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notice of injury and a filled in form of claim of indemnity, that in a letter to the plaintiff's attorney two months after the injury the defendant had used the words, "The preliminary blanks in regard to his illness have been received at this office," and that in no one of nine letters sent by the company to the plaintiff's attorney regarding his claim had any contention been made that the plaintiff had failed to give the notice required by the provision of the policy, the question, whether such notice was given, properly may be left to the jury.

Where a policy of accident insurance requires that "proofs of claim on blanks furnished by the company must be filed with the company" and the blank forms are not annexed to the policy but are to be furnished as occasion calls, it cannot reasonably be said that it was in the contemplation of the parties that the insurer in the exercise of its right would demand of the insured a certificate of a kind which it was impossible to obtain.

Accordingly, where it appears at the trial of an action upon such a policy that the blank, furnished to the insured after he had been injured while in the employ of a manufacturing corporation, required a certificate as to the circumstances from the insured, his physician and the employer, although the policy itself did not in terms require such a certificate, and that the employer refused to give such a certificate, if the insured furnished the certificates of himself and of his physician, it cannot be ruled as a matter of law that his failure to furnish that of his employer bars his recovery.

PIERCE, J. This is an action of contract to recover certain indemnity upon an insurance policy issued to the plaintiff by the defendant.

At the close of all the evidence the defendant asked the trial judge * to rule: "1. Upon all the evidence in this case, the plaintiff is not entitled to recover;" and "2. If the plaintiff is entitled to recover, he cannot recover more than $37.50 for ten months." These requests were refused and exceptions were taken.

The charge was full and accurate in its statements of law applicable to the issues, and no exception to it is argued specifically. The jury found for the plaintiff in the sum of $532.50, and the only question presented for our consideration is whether the evidence, when taken in the aspect most favorable to the contention of the plaintiff, warranted the finding and the amount of the verdict.

The jury could have found that in the month of February, 1913, the defendant issued its policy to the plaintiff providing for a monthly accident indemnity of $52.50, and a sickness indemnity of the same amount payable for a period not longer than twenty-four consecutive months.

The occupation of the assured was set forth as a dyer, dresser and extractor.

* *Fox*, J.

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When insured the plaintiff was employed by the Hinsdale Woolen Company in Hinsdale. On March 15, 1913, he entered the employ of the General Electric Company at Pittsfield, as a truck man; and on that day, when making payment of the first monthly premium to one Burke, the agent of the defendant, to deliver the policy and to receive the premiums, gave notice of his change of employment. He was asked to make application to change the policy, but he refused and no new policy ever issued. He paid the April, May, June and July premiums to Burke as they severally became due. In July, 1913, he became sick, the agent Burke came to see him, made out a written notice for him, and sent it to the company. In August, 1913, the company sent to Burke for the plaintiff a check for $37, which the plaintiff claimed was insufficient in that he was entitled to receive a full month's indemnity of $52.

Burke communicated with the defendant, and on September 4, 1913, received a check for the balance claimed by the plaintiff less the premium of $2.50 due and payable August 15, 1913. This retention of the premium operated to continue the policy in full force until September 15, 1913. On September 12, 1913, the plaintiff's right hand was crushed as the result of a heavy tank falling upon it, while he was employed at the plant of the General Electric Company at Pittsfield, and the disability of the plaintiff resulting therefrom extended for ten months.

The defendant in support of its request that a verdict be ordered in its favor, contends, on the testimony of its witness, William J. Burke, that in the company's classification the employment of the plaintiff at Pittsfield was a more hazardous occupation than that at Hinsdale, and that as a consequence the policy was avoided, or if not, that a new rating followed and resulted in a change of the indemnity obligation of $52.50 to $37.50. It had a manual showing a classification of risks, which it might have produced to the jury; failing so to do it has no just cause to complain that the presiding judge's comment on such failure was unfair and prejudicial.

The policy nowhere provides that a change to a more hazardous employment shall make the policy void, but on the contrary expressly contemplates that such a change is likely, and limits its obligation to such an indemnity as the premium paid would

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purchase in the more hazardous occupation. The burden of establishing the proposition that the new occupation was more hazardous than the old was upon the defendant, and the judge could not have ruled rightly that the defendant had proved it to a degree that required its withdrawal from the consideration of the jury.

The defendant next contends that written notice of the injury was not given to the company at its home office. The jury would be warranted in finding that the plaintiff saw the agent Burke on September 15, 1913, and that Burke agreed, as the plaintiff could not write, to write and send a written notice to the company of the plaintiff's injury. It would be warranted also in finding that Burke did as he had agreed to do; that he wrote the notice and sent it to the company. Burke had written and sent a similar notice to the company following the plaintiff's illness in July. It was warranted in finding that the company received the written notice of injury from its use of the words "The preliminary blanks in regard to his illness have been received at this office," contained in its letter to the plaintiff's attorneys, dated December 13, 1913, when read with the knowledge that a form of notice of injury and one of claim of indemnity were all that were required to be filled out and delivered to the company within stated periods of time. This inference might be found to be strengthened and emphasized by the fact that in no one of nine letters sent by the company to the plaintiff's attorneys did it so much as make reference to a claimed failure to give written notice of the injury, a default, if it existed, of sufficient weight completely to break down and destroy the plaintiff's legal claim.

The defendant further contends that the proof of claim in blanks furnished by the company, as required by the terms of the policy, has not been furnished. These blanks called for an affidavit from the plaintiff, the attending doctor and the employer. Proper affidavits of the plaintiff and the doctor were duly furnished, but the company's manager and foreman refused to make the certificate because the plaintiff had brought suit against the company for damages resulting to him from the same accident. Had the policy provided in terms for the procurement of a certificate or affidavit of named persons or classes of persons, the assured would have been bound to furnish the stipulated proof as a condition preced-

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ent to his right of recovery thereon; *Taylor* v. *Aetna Life Ins. Co.* 13 Gray, 434, 438; *Johnson* v. *Phoenix Ins. Co.* 112 Mass. 49; *Audette* v. *L'Union St. Joseph*, 178 Mass. 113; *Comstock* v. *Fraternal Accident Association*, 116 Wis. 382; but no such contractual condition is to be found therein.

The policy provides that "proofs of claim on blanks furnished by the company must be filed with the company." The blank forms to be provided are not annexed to the policy, but are to be furnished as occasion calls, and no limit to the company's requirements appears in the policy or exists in law save that they shall not be impossible or unreasonable. It reasonably could not be said that it was in the contemplation of the parties that the company in the exercise of its right would demand of the assured a certificate which it was impossible to obtain. *Insurance Co.* v. *Boykin*, 12 Wall. 433. *Peele* v. *Provident Fund Society*, 147 Ind. 543. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 185.

There is nothing in the evidence to show that the policy in question ever was cancelled in accordance with the provisions relating to cancellation set forth in the policy.

Exceptions overruled.

The case was submitted on briefs.

R. J. Morrissey & J. L. Gray, for the defendant.

W. A. Burns, J. B. Cummings & J. M. Rosenthal, for the plaintiff.

CITY OF BOSTON, petitioner.

Suffolk. May 18, 1915. — June 22, 1915.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & PIERCE, JJ.

Bridge. Chelsea Bridge. Boston. Chelsea. Revere. Constitutional Law. Municipal Corporations. Supreme Judicial Court. Contract, What constitutes. *Words*, "Maintenance."

St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion among the cities and towns which receive special benefits from the Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge a joint and equitable share of the cost of construction, reconstruction, repairs and maintenance of those bridges and to assess

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upon any street railway having a location thereon a just and equitable share of the cost of construction and repairs, is constitutional, not being a delegation of legislative powers to the judicial department of the government, but conferring upon the court a judicial or *quasi* judicial duty and power.

It is within the constitutional power of the Legislature to impose upon one city or town a part of the expense of erecting or maintaining a bridge within the limits of another city or town.

The facts that, under the provisions of Sts. 1911, c. 581; 1913, c. 341, the entire management of the operation of Chelsea Bridge is vested in the city of Boston and that the commission to be appointed thereunder was given power to assess upon the city of Chelsea and the town of Revere a portion of the cost of such operation, while somewhat novel, do not make the statutes unconstitutional.

The word "maintenance" in §§ 1, 3 of St. 1911, c. 581, relating to the apportionment by a commission to be appointed by the Supreme Judicial Court of the cost of construction, reconstruction, repairs and maintenance of certain bridges, includes "operation" and therefore it is within the power of such commission to apportion the cost of operating such bridges in accordance with the provisions of that statute and of St. 1913, c. 341.

A steel conduit over filled land may constitute a part of a single bridge, another part of which spans the mouth of a navigable river; and therefore the finding of the commission appointed under Sts. 1911, c. 581; 1913, c. 341, to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, among others, that that bridge extends from the navy yard in Charlestown to Chelsea is warranted although the middle section consists of a steel viaduct built on masonry piers over railroad tracks constructed on filled land.

It was within the power of the Legislature to authorize by St. 1913, c. 341, § 1, the commission appointed under St. 1911, c. 581, § 1, to apportion the cost of the construction of a certain bridge which then had not been built.

The facts that, after negotiations between the cities of Boston and Chelsea looking toward the assumption by one or the other of the entire duty of maintenance and expense of the north draw of Chelsea Bridge, which by St. 1878, c. 41, was to be equally divided between them, the city council of Boston and the mayor and aldermen of Chelsea passed orders authorizing the mayors of the respective cities to enter into an agreement whereby Boston should assume the entire expense of such repair and maintenance "forever" in consideration of the payment by Chelsea of $25,000; that thereafter by St. 1880, c. 159, § 1, it was provided that, upon such payment of $25,000 by Chelsea to Boston "it shall thereupon be the duty of the city of Boston to forever maintain and keep in repair the northeasterly draw and draw-piers of Chelsea Bridge, and also such portion of the bridge as may be included within the piers when relocated;" that thereafter, without the making of any agreement in writing, Chelsea paid to Boston $25,000, and Boston repaired and maintained the draw at its sole expense up to the passage of St. 1911, c. 581, do not constitute a contract which "exists between the city of Boston and the city of Chelsea, which" under St. 1911, c. 581, § 5, "prevents the carrying out of this act in any part."

St. 1880, c. 159, above referred to, was a governmental regulation of the north draw of Chelsea Bridge as it then existed, and its provisions were subject to modification or repeal according to the wisdom of the Legislature. St. 1911, c. 581, § 5, did not transform that regulation into a contract.

The fact that the city of Boston widened that draw from thirty-two to fifty feet in 1895, and in 1899 widened it further to sixty feet and, without raising any

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question as to an apportionment of the expense thereof, continued to pay the entire expense of construction, repair and maintenance up to the enactment of St. 1911, c. 581, does not affect the true interpretation of St. 1880, c. 159, as relating only to the draw as it existed in 1880.

PETITION, filed in the Supreme Judicial Court on September 13, 1912, under St. 1911, c. 581, and St. 1913, c. 341, for the appointment of commissioners for the apportionment of the expenses incurred by the construction and maintenance of Chelsea Bridge, Meridian Street Bridge and Chelsea Street Bridge.

Chapter 581 of St. 1911 is as follows:

"Section 1. Upon the application of the city of Boston, after a vote thereupon by its city council, to any justice of the Supreme Judicial Court, and after notice to and hearing of the cities of Boston and Chelsea, the towns of Revere and Winthrop, and such other cities and towns and street railway corporations as are affected by the application, said court shall appoint three disinterested persons as commissioners, neither of whom shall reside in either of said cities or towns, who, after notice and a hearing, shall apportion among the cities and towns which receive special benefits from the bridges hereinafter named a just and equitable share of the cost of construction, reconstruction, repairs and maintenance of said bridges, and shall also assess upon any street railway having a location upon any of said bridges a just and equitable share of the cost of construction and repairs: provided, however, that no costs shall be so assessed for any work done or contracted for previous to the passage of this act. Said bridges are, (1) Chelsea bridge, so-called, between Charlestown and Chelsea; (2) Meridian Street bridge between East Boston and Chelsea; (3) Chelsea Street bridge between East Boston and Chelsea.

"Section 2. Said bridges, or any of them, or any authorized substitute for any of them, shall be constructed or repaired by the city of Boston when appropriations therefor have duly been made by its city council, and the city of Boston is hereby authorized and empowered to collect from the cities, towns and street railway companies aforesaid the amounts apportioned to them by said commission, on application to the Supreme Judicial Court or any justice thereof, or to the Superior Court or any justice thereof, and said courts shall have jurisdiction in equity or otherwise to enforce said payments.

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"Section 3. After such construction or repairs said bridges shall be maintained by such cities or towns as are now by law responsible for their maintenance, but said commission may, under the provisions of section one, decide what, if any, cities or towns shall contribute to said maintenance and in what proportions, and the Supreme Judicial and Superior Courts shall have jurisdiction in equity or otherwise to enforce the payment thereof.

"Section 4. Such parts of sections eight and nine of chapter twenty of the Revised Laws as are inconsistent herewith, chapter one hundred and sixty-five of the acts of the year eighteen hundred and ninety-four, and all other acts or parts of acts inconsistent herewith are hereby repealed.

"Section 5. If any contract exists between the city of Boston and the city of Chelsea which prevents the carrying out of this act in any part, such contract shall not be impaired by this act, and if the Boston and Northern Street Railway Company, formerly the Lynn and Boston Railroad Company, and the Chelsea and Boston Railroad Company have any rights in the present Chelsea bridge which must as a matter of law exist in any new structure, such rights shall not be affected by this act.

"Section 6. This act shall take effect upon its passage."

Chapter 341 of St. 1913 is as follows:

"Section 1. The board of three commissioners heretofore appointed by the Supreme Judicial Court to apportion the cost of construction, reconstruction, repair and maintenance of certain bridges named in chapter five hundred and eighty-one of the acts of the year nineteen hundred and eleven is hereby authorized to apportion the percentage of the cost of the work done and to be done, and also to apportion and assess the percentage of the cost of maintenance and repairs provided in said act to be apportioned and assessed, and may report its apportionment to the Supreme Judicial Court notwithstanding that certain items of such cost may remain unascertained and unpaid at the time of filing the report. The report, when accepted by said court, shall be a final adjudication of all matters referred to the commissioners, and shall be binding on all the parties.

"Section 2. The said commissioners shall receive such sums for their services and for their necessary expenses, including stenographers' charges for making reports of hearings, as may be allowed

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by the Governor and Council; and the amounts so allowed shall be added to and made a part of the cost to be apportioned under the provisions of said chapter five hundred and eighty-one.

"Section 3. This act shall take effect upon its passage."

Dana Malone, Esquire, Samuel C. Bennett, Esquire, and Albert P. Worthen, Esquire, were appointed commissioners. After the filing of their report and of a supplementary report, the material portions of which are described in the opinion, the city of Boston made the motion, described in the opinion, for a confirmation of the report. The case was reserved by *Carroll, J.*, for determination by the full court.

The case was submitted on briefs.

J. P. Lyons, for the city of Boston.

L. R. Kiernan, for the city of Chelsea.

A. A. Casassa, for the town of Revere.

RUGG, C. J. This is a petition under St. 1911, c. 581, as amended by St. 1913, c. 341, for the appointment of commissioners for the apportionment of the expenses incurred by the construction and maintenance of certain bridges connecting parts of Boston and Chelsea. Commissioners were appointed, who have filed an original and a supplemental report. The case was reserved by a single justice on a motion made by the city of Boston for the confirmation of this report, except in a single particular referred to hereafter.

These statutes authorize the city of Boston to construct and repair Chelsea Bridge between Charlestown and Chelsea, Meridian Street Bridge between East Boston and Chelsea, and Chelsea Street Bridge between East Boston and Chelsea. The last named bridge is not here involved. These statutes then authorize the appointment of a commission by the Supreme Judicial Court with power to "apportion among the cities and towns which receive special benefits from the bridges . . . a just and equitable share of the cost of construction, reconstruction, repairs and maintenance of said bridges." The commission have reported that Chelsea Bridge consists of three parts: 1, Chelsea Bridge south, extending from the Navy Yard to the Mystic flats or Mystic Wharf, spanning the south channel of the Mystic River; 2, the central part, which is a steel viaduct, extending over what formerly were flats partly above and partly below low water level,

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lying between the two channels of the Mystic River, which have been filled and are now used as a freight terminal; and 3, Chelsea Bridge north, extending from the flats to Chelsea and spanning the north channel of the Mystic River. There is a draw in both the north and south parts. The commission determined that Revere, Chelsea and Boston receive special benefit from Chelsea Bridge and assessed certain percentages both of construction and maintenance on each of these municipalities. The commission determined that Boston and Chelsea alone receive special benefit from the Meridian Street Bridge and made apportionment of certain percentages of its cost and maintenance upon these two cities.

1. The constitutionality of these acts is attacked on several grounds. Certain general principles as to this branch of the law are well settled.

The cities and towns of the Commonwealth are public corporations established by the Legislature for the convenient administration of government. In the furtherance of this end the extent and character of the burdens which may be imposed on them within the bounds of reason rest in the sound judgment of the General Court and are determined by its conception of the requirements of the public good. It is within the power of the Legislature to enact that a particular bridge shall be constructed or taken and established as a public highway and that its initial cost as well as the expense of its maintenance and operation shall be paid by counties, cities and towns named in the statute or selected, as being specially benefited, by commissioners appointed by the court. This is not a delegation of legislative powers to the judicial department of government and hence is not obnoxious to the provision of the Constitution which prohibits such delegation. Declaration of Rights, art. 30. The apportionment of the burden of providing for bridges over navigable waters with the necessary draws well may be thought to require a more elaborate and careful investigation than could be given by the Legislature itself or by one of its committees. The apportionment of expenses arising from public improvements like these among the several municipalities receiving special benefits therefrom in such manner as to be just and equitable to all interests involves the ascertainment of facts which according to common usage best can be reached by the hearing of evidence and of arguments. Difficult questions

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of law might arise in the course of such an inquiry. Its investigation and decision is appropriate for a judicial tribunal. In its general characteristics the proceedings and the questions to be decided pertain to the exercise of the judicial faculty. It is plain from our previous decisions that by statutes similar to those here challenged the Legislature does not undertake to require the court to exercise legislative or executive, but only judicial or *quasi* judicial functions. *Salem Turnpike & Chelsea Bridge Corp.* v. *County of Essex*, 100 Mass. 282. *Agawam* v. *County of Hampden*, 130 Mass. 528, 530. *Scituate* v. *Weymouth*, 108 Mass. 128. *Kingman, petitioner*, 153 Mass. 566.

2. It is urged that these statutes confer legislative power to the extent of leaving to the commission appointed by the court a free field in the selection of the municipalities specially benefited and not confining them to a particular county or district. This is not a decisive factor. The principle established is a just and reasonable apportionment among those specially benefited. This involves an inquiry judicial in its nature. Naturally the number receiving a peculiar advantage above the general improvement is small. The whole subject in this respect may be left to the commissioners where the basis of apportionment established by the statute is one which requires the exercise of the judicial faculty and does not involve by its conclusion alone the repeal of statutory provisions. There is nothing inconsistent with this result in *Boston* v. *Chelsea*, 212 Mass. 127. Indeed, it there was said (page 130): "The ascertainment of the cities and towns deriving special and peculiar benefits from a designated public improvement has been left by the Legislature to the determination of commissioners appointed by this court . . . in numerous instances."

Although the cities and towns upon which an assessment for costs and expenses closely resembling those at bar may be levied frequently have been restricted to those in certain named counties or districts, there are many statutes where no such limitation has been made whose constitutionality has not been doubted. See, for example, Sts. 1868, c. 322, § 2; 1869, c. 266, §§ 1, 2; 1870, c. 265, § 2; 1875, c. 200, § 3.

3. It is within the constitutional power of the Legislature to impose upon one town a part of the expense of erecting or maintaining a bridge within the limits of another town. *Commonwealth*

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v. *Newburyport*, 103 Mass. 129. The same rule applies to counties. *Carter* v. *Cambridge & Brookline Bridge Proprietors*, 104 Mass. 236.

4. The circumstance that the entire management of the operation is vested in Boston and that Chelsea and Revere are required to contribute to such expense, although somewhat novel, is not unconstitutional. The practical advantages, for example, of placing unlimited responsibility for the operation of the north draw of the Chelsea Bridge in one municipality instead of dividing it between two is obvious. In its constitutional aspects it does not differ from requiring contribution from other cities and towns toward the cost of a bridge built and maintained by a corporation or a municipality. *Brayton* v. *Fall River*, 124 Mass. 95. *Northampton Bridge Case*, 116 Mass. 442. See Sts. 1870, c. 265, § 2; 1869, c. 266, § 5. This does not relate to matters which are in the past, but it looks wholly to the future. In principle the proposition is no different from that of vesting in an independent board the control of a public project to the expense of which numerous cities and towns must contribute. See *In re Metropolitan Park Commissioners*, 209 Mass. 381, 385. The appropriate municipal officers of Boston in effect are constituted a public board to repair, maintain and operate the bridge. There is nothing in *Hampshire County* v. *Franklin County*, 16 Mass. 76, and *In re Flatbush*, 60 N. Y. 398, relied upon by the town of Revere, inconsistent with this conclusion. No attempt here is made to appropriate any money from one municipality for the benefit of another or to pay the debts of another as in those cases.

5. The contention that the statute makes no provision for the apportionment of the expense of operating the draws of the bridges cannot be supported. The bridges span navigable waters. Doubtless no permit could have been obtained from the United States for their construction had no adequate provision been made for the draws. The word "maintenance" in §§ 1 and 3 of St. 1911, c. 581, when applied to the subject matter to which it relates, is of signification broad enough to include the operation of the draws. See *Plimpton* v. *New York, New Haven, & Hartford Railroad*, *post*, 548.

6. It is argued that no part of the cost incident to the construction, maintenance or repair of the part of the bridge over the Mystic flats can be apportioned upon any other municipality than

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Boston, because it does not constitute in truth part of the Chelsea Bridge. But the commission has reported that this bridge extends from the navy yard in Charlestown to Chelsea. This appears to accord with the legislative purpose as manifested by earlier statutes. The Mystic flats have been filled to constitute a freight terminal. This section of the bridge consists of a steel viaduct, built on masonry piers over the railroad tracks. The contention is that this is not a bridge but a viaduct, and *Swanzey* v. *Somerset*, 132 Mass. 312 is relied on. But it is apparent that this position is untenable in view of the report by the commission. A steel conduit over filled land may constitute a part of a single bridge another continuous part of which spans the mouth of a navigable river.

7. No part of the work of building the Chelsea Bridge across the south channel has been done, no contract has been made and no appropriation has been voted, but the undertaking has been entered upon to the extent of commencing work upon a temporary bridge for use while the permanent structure is being built. The objection that no apportionment of expense to be incurred for this part of the bridge can be made until it is constructed is not sound. An apportionment under these circumstances can be made legally before the work is completed and without knowing the exact amount to be expended. The apportionment is expressed in percentages which can be applied to the total when ascertained. These points are covered by *Kingman, petitioner*, 153 Mass. 566, 584, and *Adams, petitioner*, 165 Mass. 497, 499. Such apportionment expressly is authorized by St. 1913, c. 341, § 1.

The statutes here attacked are not vulnerable in any constitutional aspect.

8. It is provided by St. 1911, c. 581, § 5, that "If any contract exists between the city of Boston and the city of Chelsea which prevents the carrying out of this act in any part, such contract shall not be impaired by this act." The facts to which this section relates as reported by the commission are that the boundary line between Boston and Chelsea is the centre of the north channel of the Mystic River. By St. 1878, c. 41, the north draw of the Chelsea Bridge (constructed under St. 1872, c. 185, and reconstructed under St. 1876, c. 106) was required to be maintained and repaired equally by Boston and Chelsea. Soon after the enactment of the latter statute negotiations were begun between the two cities

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looking toward the assumption of this whole duty by one or the other city. These culminated in an order by the city council of Boston authorizing the mayor to enter into an agreement to repair and maintain the northerly draw and piers of Chelsea Bridge and such portion of the bridge as may be included within the piers, forever, in consideration of the payment by the city of Chelsea to the city of Boston of the sum of $25,000, and in the passage of a similar order by the mayor and aldermen of Chelsea authorizing the mayor to enter into a similar agreement binding the city of Boston to the same obligation as to repair and maintenance in return for $25,000 paid it by the city of Chelsea. Upon petition of the mayor of Boston the Legislature passed St. 1880, c. 159, section one of which provided that "Upon the payment of the sum of $25,000 by the city of Chelsea to the city of Boston, it shall thereupon be the duty of the city of Boston to forever maintain and keep in repair the northeasterly draw and draw-piers of Chelsea Bridge, and also such portion of the bridge as may be included within the piers when relocated." There is no evidence that any agreement in writing was executed between the two cities. In May, 1880, $25,000 was paid by Chelsea to Boston, and thereafter to the time of the passage of St. 1911, c. 581, the city of Boston repaired and maintained the draw at its sole expense

These arrangements between the two cities, in the end not expressed by a formal written document but made effective through the instrumentality of a statute, do not constitute a contract. They relate to a public work for the convenience of general travel.

It is familiar law that the laying out, construction and maintenance of highways, bridges and other conveniences or necessities for travel and for the transportation of persons and commodities, is a public function. Bridges may be built and maintained by the State, by counties, by municipalities or by special districts, or by one or more of these in combination with others, all as may be determined from time to time by the General Court. Legislative power is not exhausted by a single exercise, but may be put forth at any time in any reasonable way in furtherance of the general public good. If conditions change so that a shifting of the burden of the expenses becomes desirable in connection with the construction or maintenance of highways for travel, it is within the power of the Legislature to make such change. The various cities and towns

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of the Commonwealth are territorial subdivisions established by the Legislature for convenience in the administration of government. So far as they are charged with the performance of governmental duties and the building of edifices and structures for public use in the execution of governmental duties, they are public agencies and do not acquire therein a private right or property interest free from legislative control. Their existence may be terminated at any time and the property devoted to strictly public uses may be transferred to other governmental agencies for continued public use. They are liable at any moment to have their public powers, duties, rights and property modified, divided, combined or alienated by the Legislature.

The establishment, maintenance and repair of highways always has been recognized as a strictly public duty and not a private obligation of cities and towns. It is not of consequence what may be the particular kind of highway, using the word in its generic sense, whether roadway, ferry, tunnel or subway. They are all public enterprises. When constructed out of public moneys, they do not possess the common attributes of private investments. Bridges come within the same principle.

St. 1880, c. 159, therefore, was simply a governmental regulation touching a highway. It established no contractual relation whatsoever. It conferred no property rights upon either municipality in the constitutional sense of being protected against legislative change. It was an act of legislation and not the making or the recognition of a compact. Being a governmental regulation it was subject to modification or repeal according to the wisdom of the Legislature. *Springfield* v. *Springfield Street Railway*, 182 Mass. 41. *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49; *S. C.* 196 U. S. 539. *Higginson* v. *Treasurer of Boston*, 212 Mass. 583. *Browne* v. *Turner*, 176 Mass. 9. *East Hartford* v. *Hartford Bridge Co.* 10 How. 511, 533, 534. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 386.

The reference in St. 1911, c. 581, § 5, quoted above does not transform the pre-existing regulation into a contract. It was inserted doubtless as a precaution, so that if on investigation it should be found that a contract existed, it should be preserved. It goes no further than this

It therefore is necessary to interpret St. 1880, c. 159, and St. 1911,

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c. 581, § 5, as statutory regulations of public affairs and not as the establishment or recognition of private contracts. The provision is that through the payment of $25,000 by Chelsea to Boston it thereupon should become the duty of Boston "To forever maintain and keep in repair" the northeasterly draw and the draw-piers of Chelsea Bridge, and also such portion of the bridge as may be included within the piers when relocated. The fair construction of its words is that it applied and was intended to apply chiefly to the bridge then under consideration and not to every subsequent bridge built under a new statutory provision. The draw then in being and the space between the draw-piers about to be relocated was the subject to which the attention of the Legislature specifically was directed. It cannot be presumed that it was intended to operate through all time as to new structures built under new authority, the cost of maintaining and operating which might be much greater. The necessities of navigation through a draw in any bridge at this place might change vastly with the advancement of the art of transportation on water. The needs of travel over the bridge by the invention of new instrumentalities of journeying by land in the interval since 1880, as well as the great increase of population, presented in 1911 a problem quite different from that of thirty-one years before. Words susceptible in some connections of being interpreted as meaning until time shall be no more hardly could have been intended to have that signification when used with reference to a present contribution of a gross sum toward the maintenance of a structure so liable as a bridge with a draw over tidewater to fall into uselessness through decay or the advancement in the science of bridge building or the necessities of the public as to accommodation of travel by water or on the bridge through changing civilization. The subject matter speaks strongly of temporal affairs and fleeting conditions. All the circumstances point to a single then present structure or possibly to its successor built without new statutory authority if that could be done, to continue also until the Legislature again might deal with the subject. It would have been simple to use words which would have imposed on Boston the perpetual obligation at its sole expense to maintain, construct and reconstruct from time to time forever successive bridges with draws suitable for all public requirements, so long as a bridge might be needed at this place. That was not done.

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The ruling of the commission that St. 1880, c. 159, was not applicable to the construction of the new draw was right. But its further ruling that it applied to the cost of repairs and maintenance was wrong. When an entirely new structure was built under the authority of a new statute the statutory law as to the old structure naturally would be abrogated, except so far as retained expressly or by implication. The report of the commission is that in 1895 the north draw in the Chelsea bridge was rebuilt so as to increase the width of the roadway from thirty-two to fifty feet and the waterway from forty-four to forty-five feet, and again in 1899 so as to increase the width of the waterway from forty-five to sixty feet, all by Boston, and that no portion of the cost either of construction or maintenance was sought from Chelsea. This was an interpretation placed by the municipalities upon the statute, plainly in accord with St. 1880, c. 159, up to 1895. Doubtless that statute would continue to be effective until the Legislature passed some new act touching the matter. But in any event the conduct since 1895 is so recent that there is no room for the application of the rule that a course of dealing continued for many years may afford presumptive evidence of an original agreement, illustrated in *Cambridge* v. *Lexington*, 17 Pick. 222. The meaning of the statute of 1880 being that its rule of expense should continue until the Legislature again passed a statute about the subject, the course of conduct between the two cities since 1895 has slight significance.

The result is that the motion of the city of Boston should be granted and the report of the commission be confirmed, except as to the cost of the repairs and maintenance of Chelsea Bridge north; and that as to such repairs and such maintenance the alternative finding of the commission as to apportionment should be substituted; and that, as thus modified, the report should be confirmed. A decree is to be entered accordingly.

So ordered.

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ANNA W. REED *vs.* JOHN F. KIMBALL.

Suffolk. May 19, 1915. — June 22, 1915.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Remoteness. *Malicious Prosecution.*

At the trial of an action for malicious prosecution of the plaintiff on the charge of larceny, where the plaintiff introduced evidence tending to show that, because of such prosecution and the publicity connected with it, she lost patronage of a boarding house and restaurant maintained by her, the judge properly may exclude as too remote evidence offered by the defendant tending to show that four years after such prosecution the plaintiff was indicted for the crime of abortion and was tried and acquitted in 1912 and that the newspapers published the fact of her arrest and trial, such evidence having no tendency to show the cause of damages suffered by the plaintiff four years before.

CARROLL, J. This is a suit for malicious prosecution. The plaintiff was arrested in October, 1907, on a warrant procured by the defendant charging her with the larceny of $5,500 and was tried and acquitted. At the trial of the present action * she introduced evidence tending to show that because of such arrest and the publicity connected with it, she was damaged in her business and lost patronage in her boarding house and restaurant.

The defendant offered to show, as bearing on the question of damages, that the plaintiff was indicted for the crime of abortion in December, 1911, was tried for that offence and was acquitted in March, 1912, and that the newspapers published the fact of her arrest and the evidence at the trial. This evidence was rejected by the trial judge and the only exception now relied on by the defendant is the refusal of the court to receive it.

Because of its remoteness the evidence offered by the defendant had no tendency to show that the damage suffered by the plaintiff in 1907 was in any way affected by her arrest in 1911 and trial in 1912. The evidence was properly excluded. *Botkin* v. *Miller*, 190 Mass. 411. *Murphy* v. *Needham*, 176 Mass. 422. *Noxon* v. *Hill*, 2 Allen, 215. *White* v. *Mutual Fire Assurance Co.* 8 Gray, 566.

Exceptions overruled.

The case was submitted on briefs.

H. S. MacPherson, for the defendant.

J. H. Blanchard & H. C. Blanchard, for the plaintiff.

* Before *Lawton*, J.

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SIMON GOLDSMITH *vs.* TRAVELER SHOE COMPANY.

Suffolk. May 19, 1915. — June 22, 1915.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Landlord and Tenant, Construction of lease. *Words*, "Space."

For the purpose of determining the scope and effect of a provision in a lease, the lease is to be construed as of the date when it was made.

In a provision in a lease of the first floor of a building, "The lessor will supply light, heat, elevator service and space," the word "space" by reason of its indefiniteness does not convey the right to use any part of the basement of the building as part of the demised premises.

At the hearing of a suit in equity to enjoin the defendant from occupying a portion of the basement of the plaintiff's building, it appeared that the defendant was a tenant of the first floor of a building of the plaintiff under a lease in writing which was made while the building was in process of construction and which contained the provision, "The lessor will supply light, heat, elevator service and space," and the defendant contended that the "space" referred to was in the basement and introduced evidence tending to show that the use of such space was a necessity in his business for storage purposes, and that before and at the time of the making of the lease the lessor promised the use of such space in the basement and pointed out a definite part of the basement therefor. On conflicting evidence, the trial judge found that there was no agreement by the lessor before the making of the lease to furnish space in the basement, that such space was not necessary to the defendant's business, that after the defendant entered into possession of the premises the lessor pointed out a space in the basement that the defendant might use, which the defendant continued thereafter to use, and that the permission thus given to the defendant "was a license and was revocable." There was evidence in regard to parts of the building other than storage space in the basement to which the word "space" might have referred. *Held*, that, on the findings of the judge, a decree for the plaintiff was warranted.

BILL IN EQUITY, filed in the Superior Court on March 24, 1914, seeking to enjoin the defendant from occupying a certain portion of the basement of a building of the plaintiff, the first floor of which was occupied by the defendant as a tenant under a lease in writing.

In the Superior Court the case was heard by *Pierce*, J. The material facts are stated in the opinion. A final decree was entered granting the prayer of the bill. The defendant appealed.

The case was submitted on briefs.

A. K. Cohen, H. A. Mintz & W. J. Bloom, for the defendant.

S. Sigilman, for the plaintiff.

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CROSBY, J. In accordance with the final decree entered in the suit of *Traveler Shoe Co.* v. *Koch*, 216 Mass. 412, which decree was recorded in the registry of deeds, under the provisions of St. 1910, c. 376, the defendant in this suit became the tenant of the plaintiff of the premises described in that decree, upon the terms and conditions of the agreement of lease annexed thereto.

At the time of the signing of the agreement of lease above referred to, the building described therein had not been erected. The records show that the first floor of the proposed building was intended to be occupied as a department store.

Under the terms of the agreement, the plaintiff leased to the defendant "about sixteen hundred and seventy-seven (1677) square feet of floor space on the street floor," the exact location of the floor space being particularly bounded and described in the lease. Following the description of the premises in the lease, there are many other provisions, including the following: "The lessor will supply light, heat, elevator service and space."

The defendant contends that the word "space," found in the sentence last above referred to, conferred upon the defendant the right to the use of a defined enclosure in the basement of the building, to be used by it as a store room in connection with that part of the first floor described in the lease.

For the purpose of determining the scope and effect of the agreement of lease it is to be construed as of the date when it was made. The question is whether by its terms the word "space" included a portion of the basement to be used by the defendant as a store room and was therefore a part of the demised premises.

The judge of the Superior Court before whom the case was tried ruled and found that by reason of its indefiniteness the word "space" could not pass any part of the basement as parcel of the demised premises. We are of opinion that this was correct, especially in view of his further finding that when the agreement was made the lessor did not agree to furnish a store room, either in the basement or on the floor above the leased premises.

The defendant offered evidence to show that the persons who subsequently became the lessors, before and at the time of making the agreement of lease, promised to furnish the representatives of the defendant with a store room, either in the basement or on the floor above the leased premises. The defendant also offered

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to show that a short time before it took possession under its agreement of lease, the president of the defendant company went to the premises and asked the plaintiff Goldsmith what portion of the basement the defendant company was to have as a store room, and that Goldsmith pointed out a certain portion of the basement which he stated the defendant was so to use.

There was also evidence that the space so pointed out afterwards was occupied and used by the defendant, from the time it took possession up to the time this suit was commenced.

The trial judge found upon conflicting evidence that before the making of the agreement the persons who subsequently became the lessors did not agree to furnish a store room "either in the basement or on the floor above the leased premises." The judge further found that "after the defendant entered into possession and before the premises were actually opened for business some one of the lessors, in response to an inquiry of the defendant as to where it was to have a store room, pointed out a place in the basement, which place after the erection of uprights to which wire netting was affixed by the plaintiff became an enclosure exclusively used by the defendant from then until now as and for a store room in connection with its business carried on upon the leased premises. About the same time similar enclosures were erected in the basement in number equal to that of the expected tenancies."

The defendant contends that the use of storage space in the basement is necessary in a business of the nature carried on by it upon the demised premises and was therefore appurtenant thereto; and that the uncontradicted evidence was to that effect; but the judge was not bound to accept this testimony as true and found that such an enclosure was not "necessary and essential to the beneficial use of the premises described in the lease." *Oliver* v. *Dickinson*, 100 Mass. 114. *Gorton-Pew Fisheries Co.* v. *Tolman*, 210 Mass. 402, 410, 411.

The contention of the defendant that by the use of the word "space" a specific easement was granted to use a portion of the basement cannot be sustained, in view of the finding of the judge that the permission given to the defendant "was a license and was revocable."

It is undoubtedly true that every word in a written instrument is to be given its full meaning and effect and if possible is to be har-

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monized with the rest. That any word in such an instrument was intended to be meaningless or repugnant to other words therein is not to be inferred, if it can be so construed as to have force and effect, and this may be done consistently with rules of law and the intention of the parties. *Corbin* v. *Healy*, 20 Pick. 514, 515. Hammon on Contracts, § 406. *Ferguson* v. *Union Mutual Life Ins. Co.* 187 Mass. 8, 10. *Moran* v. *Lezotte*, 54 Mich. 83.

There was evidence to show that the word "space," as used in the sentence "The lessor will supply light, heat, elevator service and space," may have referred to space upon the outer walls of the building for the placing of electric or other signs, or it may have referred to window space, or to space upon windows on which the defendant might place signs.

In view of this evidence the word is not necessarily to be rejected as meaningless, but can be given full force and effect. Besides, the plaintiff offered to show that it referred only to space on the first floor specifically described in the agreement for lease. Whether this word was intended to apply to some part of the building or otherwise, still the judge was warranted in finding that it did not give to the defendant a right to occupy any portion of the basement. As it cannot be found that the findings were clearly wrong, it follows that the decree must be affirmed.

So ordered.

JAMES B. STEELE, executor, *vs.* THOMAS MARBLE.

Barnstable. May 19, 1915. — June 22, 1915.

Present: RUGG, C. J., BRALEY, PIERCE, CROSBY, & CARROLL, JJ.

Will, Execution, Attestation. *Witness*, Attestation of will.

Under R. L. c. 135, § 1, which provides that a will may be signed by the testator "or by a person in his presence and by his express direction," where a testatrix who was physically weak was doubtful as to her capacity to sign her name, and after being told that, if she was unable to sign her name, the nurse could sign it for her, was asked, "Is this agreeable to you?" upon which she "nodded her head and said 'Yes,'" a signature by the hand of the nurse can be found to have been a valid signature of the testatrix.

The nurse of a testatrix, who in her presence and by her express direction signed the name of the testatrix to her will, is a competent attesting and subscribing

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witness to the will, the signature attested being under R. L. c. 135, § 1, the signature of the testatrix herself and not that of the person who wrote it.

R. L. c. 135, § 1, does not require that a testator should request the subscribing witnesses to attest his will or that he should declare the instrument to be his will. It is sufficient that the witnesses should attest and subscribe the will in the presence of the testator.

APPEAL from a decree of the Probate Court for the county of Barnstable allowing the will of Esther G. Newcomb, late of Orleans.

The case was heard by *Loring*, J. The evidence is described in the opinion. At the close of the evidence the appellant asked the justice to make the following rulings:

"1. The will was not witnessed by three competent witnesses to the execution and signature by the testatrix.

"2. That the will was not witnessed by three witnesses in conformity with the requirements of the statutes, in that the signature of Margaret Phee who signed the will in behalf of the testatrix could not be legally a witness to the execution of the will.

"3. The will was not executed by Margaret Phee for the testatrix at her express direction on the evidence.

"4. It does not appear that the testatrix at the time of the alleged execution of the will identified the instrument as her will or requested the witnesses to sign the document as her last will.

"5. In order to make the execution of a will valid when executed and signed by a third person as in this case, there must be an express direction coming from the testatrix, and it is not sufficient proof of such direction to show that there was an assent of the testatrix by a nod or motion of the head, and the suggestion of a person in the room at that time that another person signed the will for the testatrix which is assented to by a nod or approval as shown by the evidence is not sufficient evidence of express direction.

"6. That on all the testimony there is not sufficient evidence to warrant a finding and decree that the will was duly executed or that it was executed by Margaret Phee by the express direction of the testatrix."

The justice refused to make any of these rulings, and found and ruled as follows:

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"I find that the instrument now presented as the will of Mrs. Newcomb was duly signed by Miss Phee in her presence and by her express direction, and was attested and subscribed in her presence by three witnesses all of whom were competent witnesses for that purpose.

"I am of the opinion that the person who signs the name of a testator by his express direction is a competent attesting and subscribing witness and I refuse the first and second requests for rulings asked for by the contestants.

"I find that the deceased's hands were so crippled with rheumatism that it had been and was hard for her to write; and that in addition, when the time came for her to sign her name to the instrument now propounded as her will she was physically in a very weak condition; that a pen was offered to her and she said 'Oh dear' and thereupon she was asked if she would like Miss Phee to sign her name. To this she nodded her head and said 'Yes.' Therefore I refuse the third and fifth requests for rulings.

"I refuse the fourth request for ruling as not being good in law.

"And the sixth in that it is not correct, having reference to the evidence in this case."

The justice made an order for a decree affirming the decree of the Probate Court and remanding the case to that court for further proceedings; and the appellant alleged exceptions.

The case was submitted on briefs.

C. H. Sprague, for the respondent, the appellant.

W. A. Morse, H. A. Harding & C. G. Morse, for the petitioner, the appellee.

BRALEY, J. The evidence is ample to show that the instrument offered for probate had been prepared by the express direction of the testatrix to whom the final and complete draft had been read preparatory to its execution. If by reason of physical weakness although possessed of testamentary capacity she was unable to affix her name, the R. L. c. 135, § 1, provides that the will may be signed by the testator "or by a person in his presence and by his express direction." The power to make this disposition of her property having been conferred solely by statute, the first question raised by the appellant's exceptions is, whether the will was executed in accordance with the requirement. *Brettun* v. *Fox*, 100 Mass. 234, 235.

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It is plain on the testimony recited in the record, that the single justice was warranted in finding, that the scrivener who drew the will, having informed the testatrix of the presence of the witnesses and that it was ready for her signature, asked her, "Can you sign your name?" and, upon her whispered response "I don't know," he said in substance, "If you are not able to sign your name, the nurse Margaret Phee can sign for you. Is this agreeable to you?" and the testatrix "nodded her head and said 'Yes.'" It necessarily followed from this unambiguous answer, that the testatrix intended and directed that the document before her should be executed in her behalf as her will.

But, if the execution was valid the statute also requires that a will must be attested and subscribed in the presence of the testator by three or more competent witnesses, and the second question relates to the competency of Margaret Phee to act also as a witness. R. L. c. 135, § 1. It is not contended that she had any actual pecuniary interest by which she would have been disqualified. *Hawes* v. *Humphrey*, 9 Pick. 350, 356, 357. R. L. c. 135, § 3. And the argument of counsel for the appellant in effect is, that she could not attest her own signature. But what had been done became by force of the statute the act of the testatrix. It was her will which the witnesses attested even if her name was written by the delegated hand of one of them. *In re Clark*, 2 Curt. Eccl. 329. *Riley* v. *Riley*, 36 Ala. 496, 500. *Robins* v. *Coryell*, 27 Barb. 556. *Scott* v. *Hawk*, 107 Iowa, 723; 4 Prob. Rep. Ann. 255; 70 Am. St. Rep. 228. See *In re Butler's estate*, 14 Prob. Rep. Ann. 395, 406.

It also was unnecessary, as the appellant further urges, that she should have formally requested the witnesses to attest the will. The statute was satisfied when they subscribed in her presence, and no publication was required. *Nickerson* v. *Buck*, 12 Cush. 332. *Tilden* v. *Tilden*, 13 Gray, 110. We accordingly find no error in the rulings at the trial, and the exceptions must be overruled.

So ordered.

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JAMES WYLIE *vs.* BLAKE AND KNOWLES STEAM PUMP WORKS.

Middlesex. May 20, 1915. — June 22, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Appeal, Interlocutory order, Entry of judgment. *Negligence,* Employer's liability. *Statute,* Construction. *Municipal Corporations,* By-laws and ordinances. *Evidence,* Violation of ordinance.

Whether an interlocutory order of the Superior Court, made upon a petition under St. 1909, c. 514, § 141, of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, is a "judgment founded upon matter of law apparent on the record in any proceeding," from which an appeal to this court can be taken under St. 1906, c. 342, § 2, it here was not necessary to decide.

It also was unnecessary to decide *whether,* in a case where no exceptions were taken, an appeal from such an interlocutory order would stay the entry of judgment.

St. 1908, c. 380, re-enacted in the codification of the labor laws as St. 1909, c. 514, § 141, which provides for the granting by the Superior Court of a petition of an employee, who has been injured in the course of his employment through some defect in the ways, works or machinery of his employer, for an order permitting the person named in the order to make an examination of such ways, works or machinery, applies to injuries for which the remedy is at common law as well as to injuries that give a right of action under the employers' liability act.

In an action by a workman against his employer for personal injuries caused by the falling of an elevator, which the plaintiff was using in the course of his employment, by reason of the breaking of a wire cable and the failure to work of a safety clutch, evidence is not admissible that the defendant failed to notify the superintendent of public buildings of the accident as required by an ordinance of the city in which the accident happened; because, assuming that the city had a right to pass such an ordinance, its violation in no way tended to show that the defendant's negligence caused the plaintiff's injury, and evidence of such violation is not admissible for the limited purpose of showing that through the defendant's failure to report the accident the plaintiff was deprived of an opportunity to obtain information as to the condition of the elevator and thereby was excused from presenting better evidence on this subject than he did present, especially where no argument has been made by the defendant that the plaintiff's case is not to be relied upon because he did not produce better evidence.

TORT at common law for personal injuries sustained on March 10, 1913, when the plaintiff was in the employ of the defendant in one of the buildings of its plant in the part of Cambridge called East Cambridge, by reason of the breaking of a wire cable and the failure to work of a safety clutch attached to a freight ele-

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vator when the plaintiff was upon the elevator in the course of the performance of his duties. Writ dated April 2, 1913.

The proceedings upon the plaintiff's petition under St. 1909, c. 514, § 141, to obtain an order for the examination of the elevator are described in the opinion.

The case was tried before *Hardy*, J. The defendant excepted to the admission in evidence of a provision of the Revised Ordinances of the City of Cambridge and of its violation by the defendant as described in the opinion.

The judge submitted to the jury certain questions, which with the answers of the jury were as follows:

1. "Was the plaintiff at the time of his injury acting in the course of his employment?" The jury answered, "Yes."

2. "Were there rules of the defendant or signs in force forbidding the employees to ride upon the elevator in question?" The jury answered, "No."

3. "Was the defendant negligent?" The jury answered, "Yes."

4. "Was the cable broken by reason of a sudden application of external force caused by the catching of a bag of flour between the platform of the elevator and the second floor?" The jury answered, "No."

The jury returned a verdict for the plaintiff in the sum of $15,250; and the defendant alleged exceptions, including the exception to the admission in evidence of the ordinance and its violation mentioned above and other exceptions which have become immaterial.

The case was submitted on briefs.

H. W. Ogden, J. M. Hoy & E. O. Proctor, for the defendant.

J. E. Hannigan & M. F. O'Malley, for the plaintiff.

CARROLL, J. This is an action at common law brought by an employee of the defendant against his employer for personal injuries sustained by him on March 10, 1913, while riding on an elevator in the defendant's factory. The defendant was not a subscriber under the workmen's compensation act. St. 1911, c. 751, and amendments thereto.

1. In May, 1914, the plaintiff made application to the Superior Court for an order directing the defendant to permit the plaintiff's attorney to make an examination of the elevator, and

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after a hearing this petition was allowed. Sts. 1908, c. 380; 1909, c. 514, § 141. From this interlocutory order the defendant appealed, and it also filed a bill of exceptions, including therein its exception to this ruling.

It is not necessary to decide whether this order of the Superior Court permitting an inspection of the defendant's elevator is a "judgment founded on matter of law apparent upon the record in any proceeding" and therefore a judgment which can be brought to this court by appeal under St. 1906, c. 342, § 2. Nor is it necessary to decide whether, if no exceptions had been taken by the defendant, its appeal from such an interlocutory order would stay the entry of judgment. The defendant's bill of exceptions having been filed, no judgment could be entered, and the validity of this order of the Superior Court is properly before us. *Potter* v. *Lapointe Machine Tool Co.* 201 Mass. 557. *Bearse* v. *Mabie*, 198 Mass. 451. *Fenton* v. *Kane*, 186 Mass. 136. *Commonwealth* v. *Dunleay*, 157 Mass. 386. *Davis* v. *Gay*, 141 Mass. 531.

The defendant argues that the statute conferring authority on the Superior Court to permit an employee, after an injury, to examine the ways, works or machinery of the employer, applies only to actions under the employers' liability act and does not apply to actions at common law, and that, this being a common law action, the Superior Court had no authority to pass the order.

The statute in question (St. 1908, c. 380) was passed in 1908, was expressly repealed by St. 1909, c. 514, § 145, and was re-enacted in St. 1909, c. 514, § 141. This statute gives to the employee who has been injured by reason of any defect in the ways, works or machinery of the employer, the right to apply to the Superior Court for an order permitting an examination of such ways, works or machinery if owned or used by the employer. No time is fixed in the statute within which the application for the order of examination is to be made. The statute undoubtedly was passed for the benefit of the injured employee and was intended to aid him in investigating the facts of the injury, so that he might determine whether he had a cause of action, and if so, under what form of action it was best to proceed.

As the statute now stands, the collocation of § 141 in c. 514 of the St. of 1909 might seem to indicate that this section applies only to actions under the employers' liability act. We think this

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is too narrow a construction to give to the statute. If the examination can be made at any time, under the order of the court, and as a result of such examination an action is brought at common law, it probably would not be contended that the employee was thereby prevented from giving in evidence all the facts discovered at such an inspection, nor would it be contended that because of making such an examination he was thereby compelled to rely solely on his rights under the employers' liability act. If the examination was made after an action was brought, the inspection might disclose such facts and circumstances as would warrant the plaintiff in amending his declaration by the addition of counts at common law. We can see no valid reason why this section should receive the construction sought for by the defendant simply because of the arrangement of this particular section in the codification of the labor laws of the Commonwealth. We are of opinion that an inspection under the statute is equally important to the employee in whatever way he is injured, whether under the employers' liability act or at common law. We see no error, therefore, in allowing the plaintiff to inspect the defendant's elevator.

2. The plaintiff introduced in evidence § 38, c. 13 of the Revised Ordinances of the City of Cambridge, and the violation of this ordinance by the defendant. The material portion of this section is as follows: "If any accident shall occur to any elevator affecting life or limb or damaging any part of the machinery or running parts of the elevator, it shall be the duty of the person in charge, immediately, before any repairs are made, or any broken pieces are removed, to notify the superintendent [of public buildings] of the accident before the elevator is operated again, so that the cause of the accident may be determined, and faulty construction remedied, and satisfactory repairs made."

When this testimony was presented, it was offered for the single purpose of showing that because of the failure of the defendant to report to the superintendent of public buildings of the city of Cambridge, as required by the ordinance, the plaintiff thereby was prevented from securing information as to the exact condition of the elevator and safety clutch and accordingly was not supposed to be able to present the best evidence bearing on this issue.

Assuming but not deciding that the ordinance was valid and

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the subject matter one on which the city of Cambridge had a right to legislate (see now St. 1913, c. 806), we do not think that the ordinance was admissible even for the limited purpose to which it was restricted by the judge. The only question before the jury was the negligence of the defendant; and its failure, therefore, subsequent to the plaintiff's injury, to notify the superintendent of public buildings of the accident in no way tended to show that it was guilty of any negligence in causing the plaintiff's injury. If the plaintiff failed to present evidence of the defendant's neglect sufficient to make out a case for the jury, this ordinance and its violation would be of no assistance to him in establishing his case, and would not have turned the balance in his favor. It is difficult to see what possible connection there is between this non-observance of the ordinance and the negligence of the defendant in causing or permitting the wire cable to be weak and the safety clutch to fail to work. It does not appear, and no contention was made at the trial, that an examination immediately following the accident would have tended to show negligence on the part of the defendant, and there was no suggestion of any concealment or suppression of evidence by the defendant. While such evidence might have been admissible to meet the argument that the plaintiff's case was not to be relied upon because he did not produce better evidence, nothing appears to show that any such intimation was made by the defendant, or that the plaintiff was in fact thereby prevented from securing better evidence. The bill of exceptions, it is true, does not contain all the evidence, but it does set out all that was said by counsel and the presiding judge when the evidence was offered, and in the offer of proof there was no charge of bad faith on the defendant's part, and no suggestion of any possible argument by it to discredit the plaintiff. The introduction of the evidence was solely on the ground that through the failure to report the accident the plaintiff was deprived of an opportunity to obtain information of the condition of the elevator and thereby was excused from presenting better evidence than he did present.

At the time the plaintiff was injured, March 10, 1913, the employer was obliged to make a report of the injury sustained by the plaintiff (1) to the Industrial Accident Board; St. 1911, c. 751, Part III, § 18; (2) to the chief of the district police; Sts.

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1909, c. 514, § 144; 1912, c. 409; and (3) to the State Board of Labor and Industries; St. 1912, c. 726, § 13. See now St. 1913, c. 746. Could it be argued that the failure to give any one of these notices had any tendency to show negligence or was an admission of liability by the defendant, or that the plaintiff in consequence of this failure was prevented from securing evidence? It has been expressly decided that the failure to report an accident to the railroad commissioners under Pub. Sts. c. 112, § 208, is no evidence of the defendant's negligence; *Devoy* v. *Boston & Albany Railroad*, 156 Mass. 161; and as explained by Rugg, J., with a full citation of authorities, in *Berdos* v. *Tremont & Suffolk Mills*, 209 Mass. 489, at page 492: "It is not enough for a plaintiff to prove a violation of a statute concurrent with his injury, but he must go further and show that a condition to which the statute directly relates has a causal connection with his injury." See also *Webb Granite & Construction Co.* v. *Boston & Maine Railroad*, 206 Mass. 572.

The ordinance in question bears no analogy to the St. of 1909, c. 534, § 22, which requires a person in charge of an automobile, in case of an injury to person or property, to stop and make himself known, the very purpose of that statute being to obtain information as to the person in charge of the automobile. *Commonwealth* v. *Horsfall*, 213 Mass. 232. The plaintiff, as we have previously explained, at any time could have brought his petition under the statute (St. 1909, c. 514, § 141), for an examination of the elevator; and the breach of the ordinance did not in any way deprive him of his rights in this respect. The ordinance was not passed for the purpose of showing the negligence of the defendant or excusing the plaintiff from the necessity of proving his case. It was passed for another purpose; and the duty of the defendant to one in the position of the plaintiff was in no way either enlarged or diminished by its passage. The locality of the accident to the plaintiff, under the special circumstances of the case, is of no importance in the regulation of the plaintiff's rights; and the mere fact that he was injured in the city of Cambridge and not elsewhere within the Commonwealth does not change the rules of evidence governing such cases, notwithstanding the ordinance in question. *Byrnes* v. *Boston & Maine Railroad*, 181 Mass. 322. *Gerry* v. *New York, New Haven,*

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& Hartford Railroad, 194 Mass. 35. To use the ordinance as an excuse for the failure to present better evidence, or to establish the liability of the defendant to the plaintiff, would divert it to an end not intended by it, contrary to the rules of law and evidence controlling the plaintiff's case.

The admission of the evidence, even for the purpose to which it was limited, seems to us to have introduced an immaterial circumstance of a very prejudicial character, tending to arouse suspicion and to divert the mind of the jury from the true issue in the case, *Delaney* v. *Berkshire Street Railway*, 215 Mass. 591, and the exception to its admission must be sustained.

It is unnecessary to consider the other exceptions taken by the defendant at the trial.

Order for inspection affirmed.
Exceptions sustained.

OSCAR M. CHANDLER, executor, *vs.* FREDERICK H. PRINCE.

Suffolk. March 8, 1915. — June 23, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Wagering Contract. Evidence, Auditor's report, Presumptions and burden of proof, Testimony at former trial. *Practice, Civil*, Exceptions, Requests for instructions, Judge's charge, Verdict. *Rules of Court.*

In an action under R. L. c. 99, § 4, by the executor of the will of a woman, for the value of securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts, where an auditor found that the testatrix employed the defendant, who was a stockbroker, "to buy and sell securities upon her account upon margin contracts, intending at the time, that the defendant should make actual purchase or sale of such securities as she from time to time ordered," and where it appeared that this finding covered all purchases and all sales ordered by the testatrix including twenty-five short sales of stocks not owned by her when she gave the order to sell, there is evidence warranting a verdict for the defendant; and this is none the less so by reason of a finding of the auditor that the testatrix employed the defendant to "carry for her upon margins such [securities] as were purchased until their sale was ordered," or by reason of a finding that the testatrix "never intended herself to pay the defendant in full for all said purchases, but she intended and contracted that after the defendant had made the actual purchases ordered that he should carry the securities for her upon margin, and sell such as she ordered to be sold or deliver to her any that she might elect to pay for in full."

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In the case above described the defendant set up and relied upon the affirmative defence that the purchases and sales were actual ones, and it was *pointed out* by this court, that the presumption created by the provision of R. L. c. 99, § 6, that the fact that the seller or the person employing another to sell for his account did not own the securities at the time of giving the order to sell shall "be *prima facie* evidence that within the meaning of section four there was an intention that there should be no actual purchase or sale," does not apply to the issue of the affirmative defence under § 4 that the purchases and sales were actual ones.

At a new trial of an action, after a rescript of this court sustaining exceptions, a transcript of the testimony given at the former trial by one of the witnesses for the adverse party who is living and within the jurisdiction of the court, is not competent in place of the witness who might be summoned.

An objection to the consideration of evidence, which previously in the trial had been admitted without objection, made when the judge referred to the evidence in his charge by saying to the jury, "You may exclude that from your minds unless it appears that it was admitted without objection," here was not considered as an exception, because an objection is not an exception. The evidence here referred to was merely a statement of a witness that he did not remember whether a certain witness at a former trial of the case gave certain testimony.

Where at the close of the charge of the presiding judge at a trial, one of the counsel asked orally for a certain instruction, to which the judge replied, "I gave everything that you requested that I thought ought to be given," this was *held* to have been a refusal by the judge to give, under Rule 45 of the Superior Court, special leave to present a further request after the conclusion of the charge.

A presiding judge at a trial in his charge to the jury, after having given instructions which were asked for by the plaintiff and by the defendant, added the following: "I do not think, gentlemen, you will get very much help from any requests that I read to you. I do not think generally requests have very much effect with a jury, because I do not think they impress them so much as an oral charge from the judge. I tried to cover in what I have said to you orally substantially everything that I think I ought to give in those requests, but lest I might have omitted something I have taken them up and have given you the requests that I think the plaintiff and the defendant are entitled to." No objection was made to this at the time, but afterwards one of the parties, at the argument of his exceptions, complained that the effect of this statement was to take back the instructions that the judge had read to the jury in accordance with the requests, and that this treatment of the requests was equivalent to refusing them. *Held*, that this contention was not justified, and that the instructions given by the judge in accordance with the requests were to be treated as given in the proper manner.

In an action under R. L. c. 99, § 4, by the executor of the will of a woman, for the value of securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts, the presiding judge put to the jury two questions as follows: 1. "Did the plaintiff's testatrix intend there should be no actual purchase or sale of the stocks?" 2. "Did the defendant have reasonable cause to believe that such intention existed on the part of the plaintiff's testatrix?" The judge, after some confusion of statement, finally explained the questions correctly and, in answer to an inquiry from the judge as to whether the explanation was clear, the foreman of

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the jury said "I guess that is clear, your honor." The judge failed to instruct the jury that if they answered the first question in the negative, they should not answer the second question, but on the contrary there were written beneath the second question the words, "You will answer that also yes or no." To the first question the jury answered, "No," and to the second question they answered, "Yes." They returned a general verdict for the defendant. There had been evidence of certain short sales which under § 6 of the statute was *prima facie* evidence that the defendant had had reasonable cause to believe that the plaintiff's intestate, when she gave the orders, intended that there should be no actual purchase or sale. An auditor, who in his report had found for the defendant on the first question, had made no finding on the issue covered by the second question. *Held*, that under all the circumstances there was nothing in the answer to the second question that tended to show that the jury misunderstood the instructions as to the first question and that accordingly the exceptions to the instructions in regard to the first question must be overruled, and that, all other exceptions having been disposed of, the general verdict for the defendant must stand.

LORING, J. This is the third time that this case has been before this court. *Chandler* v. *Prince*, 214 Mass. 180; 217 Mass. 451.

At the last trial * the plaintiff put in evidence the account furnished to him by the defendant, showing the transactions between the plaintiff's testatrix and the defendant. In addition he went upon the witness stand himself. From his testimony it appeared that the plaintiff and his half brother were financially interested in the result of the case; that the half brother (Kimball by name) managed the account for the testatrix and at the time of the trial was accessible as a witness. It appears from the bill of exceptions that he was not put upon the witness stand. In addition the plaintiff called an expert accountant (George by name) who testified that he was not only an expert accountant but that he was familiar with the brokerage business, having been engaged in it for some nine years. He testified that there were some twenty-five short sales in the defendant's account covering his transactions with the plaintiff's testatrix. On cross-examination he testified that short sales are one of the recognized

* Before *Stevens*, J. The action was brought under St. 1890, c. 437, §§ 1, 2, 4, (R. L. c. 99, §§ 4, 6, 7,) to recover the value of certain securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts. The writ was dated May 7, 1900. St. 1890, c. 437, was amended by St. 1901, c. 459, and the statute as amended was re-enacted in R. L. c. 99, §§ 4–7. The amended statute applies to cases that were pending, as this one was, at the time of its enactment. *Wilson* v. *Head*, 184 Mass. 515.

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forms of speculation and that where a broker makes a short sale for a customer the stock sold "is usually delivered on balance," and if there is no balance "he would have to get that certificate in some way to make his delivery the following day;" and that "borrowing certificates is common . . . among brokers." Then in answer to the question: "Because the broker has got to make delivery the next day whether or not he gets his certificate or not?" the witness answered, "Got to make delivery the following day some way or other." The plaintiff then rested.

The defendant put in the auditor's report and proved by the desk clerk of the Merchants National Bank that certain securities which are stated in the account to have been taken over by the defendant on payment of $11,000 were taken over by the defendant from the Merchants National Bank on payment of the sum for which those securities were pledged to that bank, and that the securities which by the account appeared to have been taken over from Charles Head and Company were taken over from that firm on payment by the defendant of the amount due from the testatrix to that firm. The defendant then rested.

In rebuttal the junior counsel for the plaintiff testified as to some evidence before the auditor. The plaintiff put in evidence the fact that one Smith attended to the "stock end" of the defendant's business. It appeared from the bill of exceptions that Mr. Smith was not called as a witness by the defendant. The plaintiff offered in evidence a certified transcript of the testimony of Smith taken at the first and second trials. These were excluded and exceptions were taken. In addition an expert was called as a witness in rebuttal by the plaintiff, who testified to the fact that after the defendant had furnished the plaintiff with copies of the defendant's account covering his transactions with the plaintiff's testatrix (as the account appeared upon his books), he refused to allow the plaintiff to examine his books generally, but offered to allow the plaintiff to verify all the transactions which were stated in that account.

The auditor found that: "After the above mentioned transfer of securities from Head and Company to the defendant, Mrs. Colburn [the plaintiff's testatrix], through her agent Kimball, employed the defendant, who is a stock broker, to buy and sell securities upon her account upon margin contracts, intending at

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the time that the defendant should make actual purchase or sale of such securities as she from time to time ordered and carry for her upon margins such as were purchased until their sale was ordered."

The account furnished by the defendant to the plaintiff's testatrix began on November 6, 1895, and continued until August 4, 1897. The last sale shown on it was made on August 4, 1897. The interest was carried forward to March 31, 1900, with a balance then due the defendant of $1,146.02, which never has been paid.

The defendant set up in his answer (*inter alia*) the affirmative defence that actual purchases or sales, or a valid contract therefor, were made by him in all transactions in which he was employed.

The plaintiff made twenty-one requests for rulings. Ten (namely, 1, 2, 3, 4, 5, 6, 7, 8, 16 and 17) were given verbatim. One (12) was given with a modification; eight (namely 9, 10, 11, 13, 15, 20 and 21) were refused without explanation; and two (18 and 19) were refused with an explanation. To the failure to give those not given verbatim the plaintiff took exceptions. The defendant made twenty-nine requests for rulings. Of these fourteen were given verbatim or with explanations, and to that the plaintiff took exceptions. After retiring the jury came into court and received further instructions from the judge in the absence of counsel for both parties. To these instructions the plaintiff took exceptions.

The following questions were submitted to the jury:

"Did the plaintiff's testatrix intend there should be no actual purchase or sale of the stocks other than those delivered to the defendant by Head and Company and by the Merchants National Bank?

"Did the defendant have reasonable cause to believe that such intention existed on the part of the plaintiff's testatrix?

"Did the defendant make actual purchases and sales of the securities ordered by plaintiff's testatrix other than those delivered to him by Head and Company and the Merchants National Bank, or valid contracts therefor?

"Were the securities received from Head and Company and from the Merchants National Bank sold by the defendant by the order of the plaintiff's testatrix or her agent?"

The jury answered "No" to the first question and "Yes" to

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the three other questions, and returned a verdict in favor of the defendant.

We are of opinion that there was no error in the instructions under which the answer "No" was given to the first question. That being so, the general verdict for the defendant can stand on that answer and it is not material to determine whether the special finding in answer to the third question (that relating to the affirmative defence of actual purchases and sales) was made under proper instructions.

We proceed to the consideration of the exceptions which have to do with the instructions under which the jury answered "No" to the first question, namely: "Did the plaintiff's testatrix intend there should be no actual purchase or sale of the stocks other than those delivered to the defendant by Head and Company and by the Merchants National Bank?"

So far as practicable we take up the exceptions which have to do with the answer to that question in the order in which they are dealt with in the plaintiff's brief.

1. The plaintiff contends that his request for a verdict in his favor as matter of law should have been granted.

So far as the first question is concerned the plaintiff's first contention in support of this ruling is that the finding which was made by the auditor does not meet the statutory *prima facie* case made out by the presence of short sales in the account rendered by the defendant. His contention is that from the terms of the finding it does not cover the short sales. We are of opinion that it does. The finding was in these words: "Mrs. Colburn . . . employed the defendant who is a stock broker, to buy and sell securities upon her account upon margin contracts, intending at the time, that the defendant should make actual purchase or sale of such securities as she from time to time ordered." That covers all purchases and all sales ordered by her including short sales, i. e. sales of stocks not owned by her when she gave the order to sell. The further finding in these words, "and [to] carry for her upon margins such as were purchased until their sale was ordered," does not cut down the previous finding. It describes the course of business which under her employment the defendant was to pursue with respect to stocks purchased on Mrs. Colburn's order. Neither is the original finding cut down (as the

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plaintiff contends that it is cut down) by the following finding made by the auditor in connection with his finding that the defendant made out the affirmative defence of actual purchases and sales. In that connection the auditor found that: "Mrs. Colburn never intended herself to pay the defendant in full for all said purchases, but she intended and contracted that after the defendant had made the actual purchases ordered that he should carry the securities for her upon margin, and sell such as she ordered to be sold or deliver to her any that she might elect to pay for in full." The plaintiff's contention as to this finding is disposed of by what was said above as to the other finding, namely: It describes the course of business to be pursued by the defendant in acting for the plaintiff's testatrix.

The next contention made by the plaintiff in support of this request is that what the auditor found was that Mrs. Colburn intended at the time the account was opened that actual purchases and sales should be made by the defendant; that her intention at the time the subsequent orders were given is the intention which is decisive, and that the auditor made no finding as to her intention at that time. The finding is that "Mrs. Colburn . . . employed the defendant . . . to buy and sell securities upon her account . . . intending at the time, that the defendant should make actual purchase or sale of such securities as she from time to time ordered." This is a finding of intention that actual purchases and sales should be made in the course of the defendant's employment by the plaintiff's testatrix, and there is no suggestion that the character of the employment was changed. This finding covers Mrs. Colburn's intention at the time the orders were given.

The plaintiff further has contended that the auditor's findings are contradicted by the account which he contends was an agreed statement of facts. The account was produced by the defendant and was admitted by him to be a correct account. It was not an agreed statement of facts. As we understand the plaintiff's argument in this connection, it is this: The account shows twenty-five short sales. All that appears in the account is that the short sales were made and the price at which the shares were sold short and the subsequent purchase of these shares and the price then paid for them. The plaintiff's contention is that, that being all

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that appears on the account, it is established that that is all that took place. Confessedly if that was all that took place and the testatrix acquiesced in that, it is established that she intended (so far as short sales are concerned) that there should be no actual sale. The short answer is that the auditor found to the contrary. But the more complete answer grows out of the testimony of George, the plaintiff's own witness. From this testimony the jury were warranted in finding that the customary way of executing an order for a short sale is for the broker making the short sale to borrow the stock and to deliver the borrowed stock to the purchaser of the stock sold short in performance of the short sale contract. But this the plaintiff contends as matter of law was not done in this case because there is no statement in the account that stocks were borrowed to make deliveries under short sale contracts. But if the broker borrowed the stocks on delivery to the lender of the market price on the day the stock was borrowed and later on (when the stocks sold short were bought in by him for the testatrix) he delivered the stock so bought in to the lender and received back from the lender the money handed to him when the stocks were borrowed, there would be no sum with which the customer should be finally debited or credited. It was open to the jury to find, on George's testimony and the auditor's finding, that the short sales were actually carried through by delivery of the stock in the usual way by the broker's borrowing the stock and delivering the borrowed stock in performance of the short sale contract. And they were warranted in making the further finding that the reason why the borrowing of the stock (when the short sale was made) and the return of the stock borrowed (when the stock sold short was later bought in) did not appear in the account was because the transaction by its very terms would not and did not result in any sum being due from or to the testatrix and that for that reason it was not stated in the account although it was the fact.

2. The plaintiff has contended that the judge was wrong (first) in not giving his requests 9, 10 and 11* and (second) in

* The plaintiff's ninth, tenth and eleventh requests for rulings were as follows:

"9. There is no presumption that the auditor's report is right; but the jury are to consider all the evidence for themselves, and may take into con-

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giving the defendant's requests 15 and 17.* In this connection the plaintiff has complained of the fact that in his charge to them the judge asked the jury three times whether there was any evidence to contradict the auditor's report.

A statement of a portion of the charge is necessary for a proper understanding of these matters. In his instructions to the jury the presiding judge first told them that an auditor's report is *prima facie* evidence of the facts found by him, but that when a trial takes place and other evidence is introduced, the auditor's report is to be taken in connection with other evidence. That if there were no other evidence ordinarily it would be the duty of the jury to return a verdict in accordance with the auditor's report. But that there might be inconsistencies in the auditor's report which would affect the credit to be given to it, or there might be in the report a statement of the evidence and of facts which would justify a jury in coming to a conclusion different from that arrived at by the auditor. He then gave this instruction: "It appears when these short sales were made — you remember there were about twenty-five short sales — it appears that she herself didn't have in her possession the securities that were sold by the defendant. That fact itself, if you find it to be a fact — that is the testimony,

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sideration the manner in which the auditor appears by the report itself to have performed his duty, in determining what weight they will give to the report.

"10. Upon all the evidence in this case, as a matter of law, the auditor's report is not now *prima facie* evidence that Mrs. Colburn intended to make actual purchases and sales, or that the defendant had reasonable cause to believe that such was her intention.

"11. Upon all the evidence in this case, as a matter of law, the auditor's report is not now *prima facie* evidence that the defendant did make actual purchases and sales for Mrs. Colburn's account."

* The defendant's fifteenth and seventeenth requests for rulings were as follows:

"15. While the R. L. c. 99, § 6, makes the fact that the seller did not own the securities at the time of giving the order to sell *prima facie* evidence of the intention described in the statute, that fact affords no evidence that the sale purporting to have been made by the broker pursuant to such order, was not actual."

"17. The auditor's finding that the purchases and sales were all actually made requires a verdict for the defendant in the absence of some evidence that the transactions were not actual."

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at any rate — if you find it — I haven't any right, gentlemen, to assume that you will believe any piece of testimony, but assuming that you do believe that testimony, that she didn't have those securities in her possession at that time, as appeared from the testimony, that is a presumption that she intended at the time when she made this contract that there should be no actual sales. I don't mean when I say presumption — a conclusive presumption, but I mean it is in itself a presumption. When the case was tried before the auditor that presumption existed, what effect he gave to the evidence on the one side and on the other I can't say, but he came to the conclusion after hearing all the evidence — I assume, taking into consideration that assumption [*sic*] — he came to the conclusion that there was an intent on her part to purchase, to have these stocks actually purchased, and that there was not an intent on her part that they should not be purchased. . . . The plaintiff says you ought to give very little weight to the auditor's report, and some evidence has been introduced — largely the evidence comes from Exhibit 3, from the statement that was given by the defendant to the plaintiff. You will have that before you and you will give such weight to it as you may think it may be entitled to. It may be that there are inconsistencies in an auditor's report of such a character as to weaken the effect of it. But you have the report before you; you have not the testimony of the witnesses that ought to be here; you have not the testimony of those witnesses who appeared before the auditor to give such light as they might give you from their presence and from their testimony. But from any testimony is there any evidence in this case to contradict the auditor's report? Is there any testimony in this case — is there anything in the report itself to affect the weight of the auditor's report? It is *prima facie* evidence. What evidence has there been introduced to contradict that evidence? It is not conclusive, the auditor's report is not, if there is other evidence in the case to meet it, to contradict it; but it is for you to take all the testimony on the one side and the other and then give such weight to the auditor's report as you think it may be entitled to. I say to you, as I have said to you before, if the auditor's report, being *prima facie* evidence upon that fact, satisfies you that that is true, that he was justified in making that report, that that is

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a fact, why, then of course the plaintiff cannot recover." Later on the judge told the jury that: "I want to repeat to you again a presumption of law which was before the auditor, that the fact, if it be a fact, that the plaintiff's testatrix did not have in her possession these stocks — some of them at any rate — if you find that to be a fact, when the sales were made, it is presumptive evidence that she did not intend that actual sales should be made." That is all that was said as to the effect of the auditor's report in connection with the auditor's finding that Mrs. Colburn intended that actual purchases and sales should be made. Further on in his charge the judge dealt with the effect of the auditor's finding (in connection with the affirmative defence) that actual purchases and sales were made by the plaintiff in all cases.

On the conclusion of the charge the following colloquy took place: "Mr. Bigelow [the plaintiff's counsel] . . . : In the second place I want your honor to charge, I don't think you did charge specifically — that the short sales are *prima facie* evidence of the plaintiff's intent and of the defendant's reasonable cause to believe. The Court: Well, I gave everything that you requested that I thought ought to be given. Mr. Bigelow: Not only that, but we put in the account with the short sales first. If the auditor's report had never come in we should have had a *prima facie* case on the whole case, and when the auditor's report was read it was not then *prima facie* evidence on the question of intent or of reasonable cause to believe, because we had evidence — The Court: It would not be profitable to argue those questions. Your rights shall be saved to everything I have not given. Mr. Bigelow: I wish to save my rights, calling attention to those particular points. I want to state further that the short sales must be overcome — the evidence in the *prima facie* case must be overcome in some way by the defendant's evidence. I except to the way in which that was put. The Court: You can't except because I didn't give except what you have asked me to give. I gave this — Mr. Bigelow: Well, so far as it was not given, and so far as you did give it contrary to that. 9, 10 and 11 — you didn't give those, I understand. The Court: 9, 10 and 11 — no, I didn't give those."

The exception taken to the adoption by the judge of the de-

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fendant's fifteenth and seventeenth requests for rulings does not affect the question of the answer to the first question. Those rulings have to do with the affirmative defence of actual purchases and sales.

The ninth ruling asked for by the plaintiff was given so far as it was correct.

We take up the tenth and eleventh requests for rulings. When this case was last before this court (*Chandler* v. *Prince*, 217 Mass. 451), it was decided that the defendant was not entitled to have the jury instructed that the auditor's finding that the necessary intent on the part of Mrs. Colburn did not exist overcomes the *prima facie* case arising from short sales. In that connection it was said that the *prima facie* case made out by the finding of the auditor and that made out by short sales are in the nature of conflicting evidence *prima facie* in character, that it cannot be said as matter of law that one kind is stronger or weaker or equal to the other; "The evidence is to be considered as a whole and the truth ascertained as in other cases of contradictory evidence." In one respect the charge of the judge went further than the opinion in *Chandler* v. *Prince*, *ubi supra*, and dealt with a matter not there considered by the court. The presiding judge told the jury that "When that case was tried before the auditor that presumption [arising from short sales] existed, what effect he gave to the evidence on the one side and on the other I can't say, but he came to the conclusion after hearing all the evidence — I assume, taking into consideration that assumption [*sic*] — he came to the conclusion that there was an intent on her part to purchase, to have these stocks actually purchased, and that there was not an intent on her part that they should not be purchased." And later on he said: "I want to repeat to you again a presumption of law which was before the auditor, that the fact, if it be a fact, that the plaintiff's testatrix did not have in her possession these stocks — some of them at any rate — if you find that to be a fact, when the sales were made, it is presumptive evidence that she did not intend that actual sales should be made." We are of opinion that this was correct. For these reasons the exceptions taken to the refusal of the judge to give the ninth, tenth and eleventh rulings asked for by the plaintiff must be overruled.

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This brings us to the complaint made by the plaintiff that the judge asked the jury whether there was any evidence in the case which contradicts the auditor's report.

It may be noted that the judge would seem to have been quite right when later on in his charge he asked the question whether there was any evidence in the case to contradict the auditor's report. At that time he was dealing with the affirmative defence of actual purchases and sales. On that issue the presence of short sales in the account does not raise a presumption as it does on the issue of the intent of the plaintiff's testatrix that there should be no actual purchase or sale.

It is plain that the exception taken to the charge does not cover the complaint now made. By the exception which the plaintiff took to the charge the presiding judge ought to have understood that the plaintiff was insisting upon his ninth, tenth and eleventh requests for rulings. But there was nothing then said which brought to the judge's attention the fact that the plaintiff felt aggrieved by the question asked by him and now complained of, namely, whether there was any evidence in the case to contradict the finding of the auditor on the issue of the intent of the plaintiff's testatrix as to the making of actual purchases and sales.

3. The plaintiff's nineteenth request * had to do with the affirmative defence of actual purchases and sales, and need not be considered.

4. The plaintiff has undertaken to point out what he terms "many serious errors and omissions in the auditor's report." These affect in the main the affirmative defence of actual purchases and sales. But if there were such errors and omissions in the auditor's report affecting the issue covered by the first question the legal aspect of them in connection with the auditor's report was fully covered by the charge of the judge stated above. They were matters to be argued to the jury as reasons for their not adopting the auditor's conclusions.

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* The plaintiff's nineteenth request for ruling is as follows:

"19. Upon the defendant's claim of actual purchases and sales the omission by the defendant to offer evidence which is within his reach, namely his books, in proof of actual purchases and sales, may be considered by the jury as an admission that the books would not support the defendant's claim."

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5. The transcript of the evidence given by Smith at the former trials was excluded properly. He was living and could have been summoned as a witness. The testimony was not competent as admissions made by an agent of the defendant.

6. In the course of his charge to the jury the judge assumed that evidence had been given of what Kimball (the plaintiff's half brother) testified to at one of the former trials. The testimony when given was not objected to. But it did not go further than a statement by the witness that he did not remember whether Kimball did give the testimony as to which inquiry was made. The attention of the judge was called to this fact after he had completed his charge. He thereupon instructed the jury in these words: "If I referred, gentlemen, to any evidence given in this case from Mr. Kimball I was in error about it; you may exclude that from your mind. I always want you not to rely upon my own recollection of the evidence but upon your recollection of the evidence. Of course Mr. Kimball's evidence given before the auditor could not be given here because he could be produced. And, gentlemen, I should not have admitted that evidence if any objection had been made to it, and I don't know, — if I said to you anything in relation to his testimony you may exclude that from your minds unless it appears that it was admitted without objection." The plaintiff's counsel then said: "Then I object." An objection is not an exception. *Ogden* v. *Aspinwall*, 220 Mass. 100.

7. It is stated by the learned counsel for the plaintiff that the judge "did not once instruct them [the jury] that the selling of securities which Mrs. Colburn did not own constituted a *prima facie* case in her favor upon the issues of her intent to wager and the defendant's reasonable cause to believe that she had such intent." It appears from the portions of the charge already set forth that the judge told the jury twice that short sales were *prima facie* evidence that Mrs. Colburn intended that no actual purchases and sales should be made. The judge's statement of the proposition when he stated it for the second time was inaccurate in that he said that it was *prima facie* evidence "that she did not intend that actual sales should be made," in place of *prima facie* evidence that she intended that actual purchases and sales should not be made. But that inaccuracy was favorable to the

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plaintiff; and, further, no objection was taken to it. In addition the judge gave the third ruling asked for by the plaintiff, which was the only ruling asked for by him on this point.*

8. At the conclusion of the charge the plaintiff orally asked the judge to instruct the jury "that the short sales are *prima facie* evidence of the plaintiff's intent and of the defendant's reasonable cause to believe." To this the judge said: "I gave everything that you requested that I thought ought to be given." By Rule 45 of the Superior Court requests for instructions have to be made in writing before the closing arguments unless special leave is given. What was said by the judge was a refusal to give special leave with respect to this oral request made after the conclusion of the charge. The third request set out above was the only request upon this point made by the plaintiff in accordance with this rule.

It should be added that the plaintiff in another part of his brief states that the failure to instruct the jury that the short sales were *prima facie* evidence of the defendant's having reasonable cause to believe as well as of Mrs. Colburn's intent, "was cured by the jury's answer to question 2."

9. The next rulings complained of by the plaintiff are those set forth in the defendant's fourth and fifth requests which were adopted by the judge.† These were plainly right, and nothing need be added to what has been said already.

10. The plaintiff contends that the defendant's sixth request

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* The third ruling asked for by the plaintiff was as follows:

"3. A short sale is the sale of securities which the customer does not own at the time of giving the order to sell, and is *prima facie* evidence of a wagering contract between the customer and the broker."

† The defendant's fourth and fifth requests were as follows:

"4. While R. L. c. 99, § 6, makes the fact that the seller did not own the securities at the time of giving the order to sell *prima facie* evidence of the intention called for by the statute, there is, nevertheless, nothing illegal about a sale made under such circumstances and if Mrs. Colburn intended the defendant actually to make such sales, the plaintiff cannot recover on the strength of them.

"5. If Mrs. Colburn when giving the defendant an order to buy certain securities intended them to be bought and carried for her on margin, although she never intended to take them up herself, she did not have as to such transactions the intent required by the statute."

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(which was given by the judge) * is in conflict with the statement in *Chandler* v. *Prince*, 217 Mass. 451, 459, that: "The extent of her financial resources and the stocks actually owned by her bore upon this issue," namely, whether the transactions entered into by the plaintiff's testatrix were wagers or real transactions. The defendant's sixth request was not in conflict with that. The sixth request must be read, as it was given, in connection with the fifth. What the two meant was that if Mrs. Colburn intended that the stocks which she ordered bought on her account by the defendant should be actually delivered to the defendant and carried by him until she paid him his advances incurred in their purchase and took them up on the one hand, or on the other hand until she ordered them sold and delivered by the defendant to the purchaser under that contract of sale, she did not have the intent required by the statute. That it was immaterial which of these two courses of business Mrs. Colburn meant to pursue; and in that connection it was "immaterial that Mrs. Colburn may not have had money enough to take up from the defendant the securities she had ordered purchased."

11. The defendant's seventh and eighth requests adopted by the judge † were correct.

12. The plaintiff complains that the judge did not give the fourteenth and fifteenth rulings asked for by him ‡ and did

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* The defendant's sixth request was as follows:

"6. It is immaterial that Mrs. Colburn may not have had money enough to take up from the defendant the securities she had ordered purchased."

† The defendant's seventh and eighth requests were as follows:

"7. It is immaterial that the account in question was a speculative or margin account.

"8. Margin transactions are not illegal and the fact that an account is made up entirely of them does not of itself give the customer any right to recover from the broker under the statute in question."

‡ The fourteenth and fifteenth rulings asked for by the plaintiff were as follows:

"14. Even though the defendant executed through the stock exchange every order given by the plaintiff to buy or sell stocks, their dealings may be wagering contracts under Rev. Laws, c. 99, Section 4.

"15. The plaintiff is not bound to prove 'bucketing' as defined in St. 1907, c. 414, in order to recover."

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give the twenty-ninth ruling asked for by the defendant.* The plaintiff's fourteenth request and the defendant's twenty-ninth request have to do with the affirmative defence of actual sales and therefore need not be considered.

As to the plaintiff's fifteenth request, it was not necessary to take up the definition of "bucketing" in a statute which so far as appears was not referred to at the trial and was not in question in the case, namely, St. 1907, c. 414. For that reason the judge was justified in not giving that ruling.

13. The plaintiff has contended that he is entitled to have the exception sustained which he took to the way in which the judge dealt with his fifth, sixth, seventh and eighth requests for rulings.† All of these requests had to do with the affirmative defence of actual sales and therefore need not be considered.

14. There is a long argument in the plaintiff's brief as to "short sales" and "actual sales" and as to "borrowing" and as to the "constitutional question." We find no exceptions which raise the questions involved in these arguments and therefore we do

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* The twenty-ninth ruling asked for by the defendant was as follows:

"29. If the defendant upon the receipt of an order from Mrs. Colburn for the purchase of certain shares of stock listed on the New York Stock Exchange, made a valid contract with a member of said exchange for the delivery of said shares to the defendant on demand then, as to such shares, the affirmative defence permitted by the statute is made out."

† The plaintiff's fifth, sixth, seventh and eighth requests were as follows:

"5. The burden of proving actual purchases and sales is on the defendant, and if the evidence is evenly balanced on that point in the minds of the jury, then the defendant has failed to make out that defence.

"6. The defence of actual purchases and sales depends upon whether the transactions were real ones at the time they were set off against each other in the clearing house of the stock exchange; the set-off cannot be a real one unless the opposite transactions that are so set off are themselves real ones, and have really been made and carried out.

"7. The actuality of the sale, even when carried on through the medium of the stock exchange, depends upon whether the broker actually had in his control the securities called for by the transactions when he set off the deliveries to be made by him as broker for his selling customer, against deliveries to be made to himself as broker for a purchasing customer.

"8. The words 'actual purchase or sale' in c. 99 of the Revised Laws mean a real and tangible transfer of a full and complete title to an existing, definite and certain security."

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not consider them. The only request referred to in these arguments is the plaintiff's thirteenth request.* Of this request it is enough to say that there is no evidence in the case that the defendant did buy securities of the plaintiff or sell securities to the plaintiff under his employment.

15. The plaintiff has complained that the twelfth ruling † asked for by him was not given because the judge added at the end the words: "At some time." The addition was correct. It may be doubted whether this instruction had to do with anything but the affirmative defence of actual purchases and sales.

16. After giving the instructions asked for by the plaintiff and the defendant which the judge adopted he added this: "I do not think, gentlemen, you will get very much help from any requests that I read to you. I do not think generally requests have very much effect with a jury, because I do not think they impress them so much as an oral charge from the judge. I tried to cover in what I have said to you orally substantially everything that I think I ought to give in those requests, but lest I might have omitted something I have taken them up and have given you the requests that I think the plaintiff and the defendant are entitled to." No objection was made to this by the plaintiff at the time. He now complains that the effect of this statement was to take back the rulings given by the judge which were set forth in the plaintiff's requests for rulings and so the requests asked for by the plaintiff which the judge said he adopted were in fact refused. We are of opinion that that is not correct.

17. The other exceptions taken by the plaintiff are to the instructions given by the judge when the jury came back for further instructions. These instructions were given in the absence of counsel for both parties. At this time the foreman told the

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* The plaintiff's thirteenth request was as follows:

"13. Upon all the evidence in the case, as a matter of law, the defendant was employed by the plaintiff to buy and sell securities for her account, and the defendant has no right to buy securities of the plaintiff or sell the securities to the plaintiff under his employment."

† The twelfth ruling asked for by the plaintiff was as follows:

"12. Upon all the evidence in the case, as a matter of law, the contract between the plaintiff and the defendant was that the defendant should buy and sell securities and not that he should make contracts therefor without delivery."

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judge that the jury were in a quandary about the first question, stating: "We figure that that is a negative question. The answer yes, for instance, would conflict, and the answer no would conflict." The judge told the jury that the question was put in the form in which it was put because what the plaintiff had to prove in order to make out a case under the statute was that the plaintiff's testatrix intended that there should be no actual purchase or sale of the stocks ordered by her to be purchased and sold on her account by the defendant. He explained that if she intended that there should be no actual purchase the answer should be "Yes." That to make out a case it was necessary that there should be affirmative intention on her part that there should be no actual purchase. The judge then stated the proposition in these words: "If she intended there should be no actual purchase, the answer should be yes. . . . If you say no, it isn't proven that she didn't intend there should be no actual purchase." There was further explanation on the part of the judge, after which the jury were asked if they understood it and they said they did. In the course of that explanation he added this: "If she didn't have any intent about it one way or the other the plaintiff wouldn't recover. The plaintiff can recover only on the ground that she had an affirmative intent that no actual sale should be made. That is the reason why the question is put in that form." After this the judge stated the matter wrongly in these words: "If you say yes, why, the plaintiff cannot recover. . . . Should you say no, then you come to the other question, whether the defendant had reason to believe that she had no intention that the stock — actual sales should be made — or whether he had any reasonable cause to believe." Later the judge said: "I want to change what I said to you. So under the statute, if your answer is yes — 'Did the plaintiff's testatrix intend' — she might be able to recover. If you say no, she didn't have that intention, then she can't recover. Then you come — 'No,' — she can't recover; 'Yes' — perhaps she can recover. If you say yes, she did affirmatively have that intention, that there should be no actual sales or no actual purchases, then you come to the question of whether or not the defendant believed that fact or had reason to believe it." After this the foreman said: "I guess that is clear, your honor." Then the presiding judge said:

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"You will answer that question either yes or no. If you answer the question no, she didn't have an intent, to make purchases — (pausing). If she did intend there should be no actual purchase, and you say yes, then you come to the next question, as I have said to you, whether or not the defendant knew of that or ought to have known of it, and if you say the defendant did know of it or ought to have known of it, it would be a defence if the sales or purchases were actual sales or purchases. If you answer no — 'Did the plaintiff's testatrix intend there should be no actual purchases or sales of the stocks other than those delivered to the defendant by Head and Company' — if you say there was not that intent, then the plaintiff can't recover in any event."

Although the judge stated the matter wrongly in one place, he corrected it later on. In addition he was about to state it wrongly in another place, but before he made the statement he paused and then stated it rightly. The matter finally was stated properly by the judge. To make sure of this the judge asked the foreman if it was clear, and the foreman said that it was.

The plaintiff contends that the answer to the second question shows that the jury did not understand the instructions finally given by the judge as to the first question. But we cannot give our assent to that argument. The presence of short sales in the account was *prima facie* evidence that the defendant had reasonable cause to believe that the plaintiff's testatrix, when she gave the orders, intended that there should be no actual purchase and sale. The auditor made no finding upon the issue covered by the second question. Under these circumstances the answer of the jury to the second question was the only answer that they could make to that question. It is true that in his charge to the jury the judge did not tell them that short sales were *prima facie* evidence of reason to believe on the part of the broker. But the statute (making this provision) was read to the jury both by counsel and by the judge. And the plaintiff's admission that the judge's failure to instruct the jury on that point "was cured by the jury's answer to question 2" disposes of the contention.

In his charge to the jury the judge did tell them that if they answered the first question in the negative the plaintiff could not recover. But he did not go on and instruct them that if they an-

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swered that question in the negative they should not answer the second question at all. It might have been well if he had done so. Not only did he not do so, but it appears from the bill of exceptions that at the end of the second question these words appeared: "You will answer that also yes or no." Under all the circumstances there is nothing in the answer to the second question which tends to show that the jury misunderstood the instructions as to the first question.

The exceptions as to the instructions under which the answer to the first question was given must be overruled and the general verdict must stand. It is

So ordered.

V. J. Loring & W. R. Bigelow, (*J. P. Sylvia, Jr.,* with them,) for the plaintiff.

R. G. Dodge, (*H. S. Davis* with him,) for the defendant.

EDWARD P. KEITH *vs.* WILLIAM S. RADWAY & another & trustees.

Suffolk. March 17, 1915. — June 23, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Contract, Agreements collateral to a promissory note, In writing. *Bills and Notes. Pleading, Civil,* Declaration.

An agreement to renew a promissory note is a collateral agreement and not an agreement that contradicts the note.

A declaration alleged that the defendant owned three quarters of the capital stock of a certain corporation; that the plaintiff owned bonds and capital stock of the corporation; that the plaintiff was urged by the defendant to purchase further bonds of the corporation in the amount of $1,100, and that the defendant "promised, agreed and warranted" to the plaintiff that, if he would do so, the defendant would lend him the money to pay therefor on the plaintiff giving to the defendant his collateral promissory note secured by the bonds so purchased and by the bonds and shares of stock he already owned, and further would provide the corporation with money to a certain amount and would see to it that the bonds would be redeemed at an early date "from the funds so to be provided by the" defendant, "at which time" the plaintiff's note "could be paid, and that the" defendant "would carry said note until that time and that in the meantime the interest on said bonds and the dividends on said stock would take care of the interest on said note;" that the plaintiff,

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relying on such "promises, representations, agreements and warranties," did as he was urged to do; that his collateral note was renewed from time to time; that at a certain date when the plaintiff's last note was overdue, the plaintiff's bonds were worth $8,700, and that the defendant, in violation of his "representations, agreements, promises and warranties" at that time "sold out the said bonds and stock at public auction without notice to or knowledge of the plaintiff and bought them in through a dummy bidder for $250." The defendant demurred. *Held*, that the alleged "promises, agreements, representations and warranties" were not contradictory of the note, but were collateral to it, and that the declaration, although not well drawn, set forth a cause of action and was not so badly drawn as to warrant a sustaining of the demurrer.

CONTRACT OR TORT, with a declaration as amended in five counts. The material allegations of the fifth count, which alone is material to this decision, are described in the opinion. Writ dated May 21, 1914.

The defendant demurred to the declaration and to each count thereof. The demurrer was heard by *Wait*, J., and was sustained as to each count excepting the second, which alleged a cause of action for conversion. The plaintiff then discontinued as to the second count, the defendants moved for judgment, judgment was entered for the defendants; and the plaintiff appealed.

The case was submitted on briefs.

G. L. Wilson, for the plaintiff.

J. A. Mahoney, for the defendants.

LORING, J. The fifth count in substance alleges that the defendants owned and still own three quarters of the capital stock of a corporation there named; that within six years the plaintiff was the owner of bonds of that corporation to the amount of $500, and two hundred and eighty-four shares of its capital stock; that although he did not wish to do so and had no money for the enterprise hereinafter described (as the defendants well knew) the defendants induced him to buy bonds of the corporation amounting to $1,100, and "promised, agreed and warranted" to the plaintiff that if he would buy said additional $1,100 of bonds the defendants would lend him the money to pay for the same on his giving them his collateral promissory note secured by the bonds so purchased, the bonds he then had and the two hundred and eighty-four shares of stock he then had, and further that they would provide the corporation with money to the amount of $50,000, and would see to it that the bonds would be redeemed at an early date "from the funds so to be

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provided by the defendants, at which time the note could be paid," and "that they would carry said note until that time and that in the meantime the interest on said bonds and the dividends on said stock would take care of the interest on said note;" that the plaintiff, relying on said "promises, representations, agreements and warranties," bought the additional $1,100 of bonds, executed a collateral promissory note and pledged as security for it the bonds mentioned above amounting to $1,600 and the two hundred and eighty-four shares of stock; that thereafter the note was renewed from time to time, "and on March 18, 1914, said bonds and stock were of the value of $8,700," whereupon the defendants in violation of their representations, agreements, promises and warranties above set forth "sold out said bonds and stock at public auction without notice to or knowledge of the plaintiff and bought them in through a dummy bidder for $250."

The defendants in their brief have taken the position that the note was overdue at the time that the plaintiff's securities were sold and bought in by them. We take the case on that basis. Their defence is that the promises, agreements and warranties relied upon by the plaintiff and which the plaintiff says were broken when the bonds and stocks were sold at public auction, were promises, agreements and warranties which contradicted the notes; but we are of opinion that that is not so. We are of opinion that the promises, agreements and warranties alleged in the declaration were agreements collateral to the note. They were in effect that they would renew the note until the funds of the corporation were sufficient to enable it to pay the plaintiff the principal of the bonds which was more than the amount of the note. An agreement to renew a note is a collateral agreement and not an agreement which contradicts the note. For cases where the principle of collateral agreements has been applied, see *Willis* v. *Hulbert*, 117 Mass. 151; *Carr* v. *Dooley*, 119 Mass. 294; *McCormick* v. *Cheevers*, 124 Mass. 262; *Graffam* v. *Pierce*, 143 Mass. 386; *Ayer* v. *R. W. Bell Manuf. Co.* 147 Mass. 46; *Durkin* v. *Cobleigh*, 156 Mass. 108; *Cole* v. *Hadley*, 162 Mass. 579; *Drew* v. *Wiswall*, 183 Mass. 554.

This count of the declaration is not well drawn. But it sets forth a cause of action. On the whole it is not so badly drawn that the defendants should be allowed to escape the liabil-

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ity there set forth because it is not set forth with more formality.

The entry must be: Judgment reversed so far as the fifth count is concerned. The case to stand for trial on the fifth count.

So ordered.

SECOND SOCIETY OF UNIVERSALISTS IN THE TOWN OF BOSTON *vs.* ROYAL INSURANCE COMPANY, LIMITED.

Suffolk. March 23, 1915. — June 28, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Insurance, Fire. *Arbitrament and Award. Contract,* Performance and breach. *Equity Jurisdiction,* Adequate remedy at law. *Pleading, Civil,* Declaration.

An allegation, in the declaration in an action of contract upon a policy of fire insurance in the Massachusetts standard form seeking to recover damages greater than the amount awarded by arbitrators to whom the question of the amount of the loss was referred under the terms of the policy, that no notice of hearings before the arbitrators was given to the insured by the arbitrators, is not sufficient to warrant the overruling of a demurrer to the declaration on the ground that such lack of notice made an award by the arbitrators invalid, there being no allegation that the insured did not have notice of the hearings and was not heard, and such facts not being inferrible from the allegation made.

The requirement of R. L. c. 194, § 7, that the arbitrators there referred to shall "meet and hear the parties" necessarily implies that they shall hear and consider relevant evidence.

Where an agreement for arbitration between the insured and the insurer of the question of the amount of loss under the provisions of a policy of fire insurance in the Massachusetts standard form provides "that the provisions of" R. L. c. 194, §§ 6, 7, "shall apply as a part of the agreement for this submission," the arbitrators must hear and consider relevant evidence, and if they refuse to hear any evidence from the insured and give him no opportunity to present any evidence bearing on the question of his loss or damage occasioned by the fire, an award made by them is invalid.

It seems, however, that such arbitrators at their hearings would not be bound by the strict rules of evidence, but might proceed by the summary methods implied in an arbitration.

Under the provisions of a policy of fire insurance in the Massachusetts standard form, which was issued after the enactment of the provision of St. 1907, c. 576, § 57, that "if buildings insured against loss by fire, and situated within this Commonwealth, are totally destroyed by fire, the company shall not be liable

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beyond the actual value of the insured property at the time of the loss or damage" if the insured property is a "total loss," arbitrators as to the amount of the loss, appointed under the provisions of the policy, are warranted in refusing to take into account loss caused to the insured by the tearing down of a part of the walls of the building by municipal authorities at the expense of the insured or by the insured on the order of such authorities but for the safety of the public after the fire was under control but before it was extinguished, and an increased cost of rebuilding due to the fact that under certain building laws the insured must use more expensive materials.

General allegations of fraud, bias and prejudice of certain arbitrators, set forth in a declaration without specification of definite acts upon which they are based, are not enough to require judicial inquiry into the validity of an award made by the arbitrators.

Mere inadequacy of an award by arbitrators, appointed under the provisions of a policy of fire insurance in the Massachusetts standard form to determine the amount of loss suffered by the insured, is no ground for setting aside the award if it was made honestly and without mistake.

It was alleged in the declaration in an action upon a policy of fire insurance in the Massachusetts standard form that the award made by arbitrators appointed under the provisions of the policy was "grossly inadequate." It appeared from other allegations in the declaration that the insured claimed $100,000, that a part of his claim was based upon contentions unsound as a matter of law and that the arbitrators awarded him $57,604. The defendant demurred to the declaration. *Held*, that the allegation that the award was "grossly inadequate" was not sustained by the allegations of the declaration.

The provisions of a policy of fire insurance in the Massachusetts standard form, relating to the submission to arbitration of the question of the amount of loss suffered from a fire within the terms of the policy, are valid.

Under the provisions of a policy of fire insurance in the Massachusetts standard form, while a reference to arbitrators of the question of the amount of loss, as therein provided for in case the parties are unable to agree, is a condition precedent to a right of action upon the policy, the return of an award or the making of a valid award is not such a condition precedent.

If one insured against loss by fire under the provisions of a policy of fire insurance in the Massachusetts standard form, after suffering a loss, is unable to agree with the insurer upon the amount of the loss and in accordance with the provisions of the policy that question is submitted to arbitrators who return an award which under the circumstances is invalid as a matter of law, and if thereafter the insured offers to proceed with a new arbitration but the insurer refuses to join therein and insists upon the validity of the award already made, the insured need not resort to a suit in equity for an adjudication of the invalidity of the award, but has an adequate remedy at law in an action upon the policy. In such an action he may prove the invalidity of the award and may recover the amount justly due him under the provisions of the policy; and the insurer, if he contends that the award is valid, may offer it in defence to the action.

CONTRACT upon a policy of fire insurance in the Massachusetts standard form. The material allegations of the declaration as amended are described in the opinion. Writ dated October 15, 1914.

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The defendant demurred. The demurrer was heard by *Wait*, J., and was sustained, and judgment was entered for the defendant. The plaintiff appealed.

J. J. Higgins, (*A. A. Gleason* with him,) for the plaintiff.

H. E. Warner, for the defendant.

RUGG, C. J. This is an action of contract upon a policy of fire insurance in the Massachusetts standard form. The material allegations of the declaration, after averring the issuance of the policy, a total loss by fire of the building insured, and the inability of the parties to agree upon the loss resulting from the fire, are that there was a reference of the amount of damage to arbitration as provided in the statute and an award by a majority of the referees only, and a refusal by the third to join in the award because of a belief that it did not contain all the loss suffered by the fire, and further that the award so made is invalid because the referees (1) failed to give to the plaintiff notice of hearings held by them, (2) "refused to hear any evidence from the plaintiff, and gave the plaintiff no opportunity to present any evidence bearing on the question of its loss or damage occasioned by the fire," (3) refused to take into account loss caused to the plaintiff by the tearing down of a part of the walls of the building by the city of Boston at the expense of the plaintiff, but for the safety of the public, after the fire was under control but before it was extinguished, (4) would not consider loss sustained by the plaintiff by being required at its own cost to tear down a part of the walls of the building, (5) refused to estimate as a part of its loss the increased cost of rebuilding due to the fact that under the building laws the plaintiff must rebuild a new structure to take the place of the one destroyed, of much more expensive materials, and (6) returned an award for a sum "grossly inadequate, unjust and inequitable."

The first of these allegations of invalidity is not sufficient to overturn the award. It is merely that no notice of hearings was given to the plaintiff by the referees, but not that no hearings were given as required by the terms of the reference, nor that the plaintiff did not in fact have notice of the hearings and was not heard. For aught that appears, the plaintiff in truth may have known all about the hearings and been heard at length. This allegation does not go far enough to show that any sub-

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stantial right of the plaintiff was affected. No intendment in this respect can be made in favor of the pleader. *Bowker* v. *Torrey*, 211 Mass. 282. *Eldredge* v. *Mutual Life Ins. Co.* 217 Mass. 444.

The next averment is that the referees refused to hear evidence as to the loss. The amount of loss was the only matter submitted to them. It was quite disconnected with general liability of the defendant to the plaintiff, and with all other questions. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 212 Mass. 318. The reference was in writing. It was not in the brief words of the policy, but it expressly incorporated into its terms by reference Pub. Sts. c. 188, §§ 6, 7 (now R. L. c. 194, §§ 6, 7).* That chapter is the general law authorizing reference to arbitration. Section 7 provides that arbitrators shall "meet and hear the parties." While it is not specifically stated in either of these sections that evidence must be received, it is implied by every fair intendment. The requirement in a general law touching arbitration that there must be a hearing, of necessity means listening to relevant evidence. All controversies which may be the subject of an action at law or a suit in equity may be submitted to arbitration under the statute. Pub. Sts. c. 188, § 1. R. L. c. 194, § 1. In most instances it would be impossible in the nature of things for the arbitrators to decide the controversy with any degree of intelligence, except after a hearing where evidence was received. In no other way could a just decision reasonably be expected. This has been the universal practice under general arbitrations. *Lincoln* v. *Taunton Copper Manuf. Co.* 8 Cush. 415. *Conrad* v. *Massasoit Ins. Co.* 4 Allen, 20, 22. *Peabody* v. *Rice*, 113 Mass. 31, 34. *Nay* v. *Boston & Worcester Street Railway*, 192 Mass. 517, 521. By the reference to the procedure under the general law as to submissions to arbitration, the practice as to the kind of hearing there necessary was imported into the reference here under review. The parties might agree to a reference somewhat broader or more detailed in its scope than the policy demanded, and such an agreement is binding upon them.

* The portion of the agreement for arbitration there referred to was as follows: "It is understood . . . that the provisions of Sections Six and Seven of Chapter 188 of the Public Statutes shall apply as a part of the agreement for this submission. . . ."

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The requirement that the referees should "meet and hear the parties" implies in this connection that relevant evidence if offered shall be received and considered. *Warner* v. *Collins*, 135 Mass. 26. *Palmer* v. *Clark*, 106 Mass. 373, 389.

That there shall be a hearing does not mean that the referees must be bound by the strict rules of evidence. They may proceed by the summary methods implied in an arbitration. But they could not arbitrarily reject all material evidence under such a reference as the present.

An award regularly made is not lightly to be set aside, even though there were informalities and irregularities. An award should stand "unless it plainly appears that the acts of alleged misconduct have prejudiced or may have prejudiced the party complaining, or have violated those well settled rules which justice requires should be observed in order to ensure the fair determination of the matters in dispute." *Farrell* v. *German American Ins. Co.* 175 Mass. 340, 347. *Jones* v. *Boston Mill Corp.* 6 Pick. 148. *Smith* v. *Boston & Maine Railroad*, 16 Gray, 521. But a refusal to hear parties when the submission requires a listening to evidence goes to the root of a reference like the present. See *Hills* v. *Home Ins. Co.* 129 Mass. 345.

It is not necessary to determine the effect of St. 1910, c. 489, which makes it the duty of referees "to meet within ten days after the appointment of the third referee to hear the evidence in the case," nor to decide how far that statute affects *Hanley* v. *Ætna Ins. Co.* 215 Mass. 425, which arose under a policy to which it was not applicable. The terms of the reference in the case at bar made imperative the hearing of evidence and distinguish it from *Hanley* v. *Ætna Ins. Co.* Indeed, it is pointed out in the opinion in that case, 215 Mass. 430, 431, that, ordinarily, when the building insured is wholly destroyed (as it is alleged to have been in the case at bar), it would be the wise course for referees to receive evidence and "to determine the amount of loss in the usual way in which civil cases are tried."

The refusal of the referees to take into account as elements of loss the cost caused to the plaintiff by the tearing down of the walls of the building during the progress of the fire, at its expense, by public officers, and after the fire, by itself, at its own expense, and the increased cost of rebuilding due to the fact that under the

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building laws a new structure must be of more expensive materials, was right. The controlling allegation in this aspect of the case is that the building was a total loss. It is provided by St. 1907, c. 576, § 57, that "if buildings insured against loss by fire, and situated within this Commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage." This statute was in force at the time when the policy here in question was issued. The standard form of insurance policy is set forth in the same statute. Therefore, it is obvious that the rule of damage in case of total loss established by the section just quoted is the one by which the parties to this action are bound. It is not alleged that the referees through prejudice refused to consider the existence of the building ordinance as bearing upon the actual value of the old building just before its destruction by fire, if it had any effect in this regard. Plainly, the elements of loss contended for had no relation to the actual value of the insured property. Considerations which might be germain to an inquiry as to the amount of damage resulting from a partial destruction of the building insured, have no place where there is a total destruction by fire. *Hewins* v. *London Assurance Corp.* 184 Mass. 177.

The final averment is that the gross inadequacy of the award is a ground for setting it aside. This is supported by the further allegation that it arose from the fraud, bias and prejudice of the referees. But this is wholly general, without specification of facts. It is plain that general allegations of fraud, and likewise of bias and prejudice, without stating definite acts which constitute a fraud or bias and prejudice, are not enough to require judicial inquiry. *Nichols* v. *Rogers*, 139 Mass. 146. *Nye* v. *Storer*, 168 Mass. 53, 55. *Garst* v. *Hall & Lyon Co.* 179 Mass. 588, 590. *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 697. Mere inadequacy of an award honestly made without mistake is no ground for setting it aside. The parties, having chosen their tribunal, are bound by its decision no matter what may be its infirmities of judgment. *Boston Water Power Co.* v. *Gray*, 6 Met. 131. *Rundel* v. *LaFleur*, 6 Allen, 480. As there is no allegation of mistake, that may be laid out of the case. But the plaintiff is entitled to an honest award free from the taint of fraud or prejudice. An award might be so grossly and palpably below the

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actual loss as to afford intrinsic evidence of fraud, bias or prejudice. But, in order to reach to this point, the inadequacy of the award must be, to use the words of Lord Thurlow in *Gwynne* v. *Heaton*, 1 Bro. C. C. 1, at page 9, "so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it."

The inadequacy averred in the case at bar is the difference between an alleged value of $100,000 and the award of $57,604. The value as alleged must be assumed in the absence of other specification to be the estimate of value made by the plaintiff, for no other standard of value is set forth. The difference between the claim or estimate of a party plaintiff and the fact not infrequently is as great in proportion as that here alleged. It would scarcely evoke an exclamation of astonishment from the ordinary person of sound sense to be told that an award in a case of taking under eminent domain was fifty-seven per cent of the claim advanced by the landowner. Inquiries as to value in insurance cases of total loss in general resemble those in takings by eminent domain. The allegation of inadequacy loses some of its force when read in conjunction with the averments that three elements of damage put forward by the plaintiff, one of which is said to be at least $20,000, were disallowed by the referees; all three of these claims have been shown to be unsound in law by what has been said. The inadequacy of the award here alleged, in view of all the circumstances, does not by itself alone show fraud, bias or prejudice by the referees.

The only allegation of invalidity of the award which is sound, is that the referees refused to hear evidence as to the loss. The averment in this respect is sufficient to show invalidity under the terms of the reference.

The contract of insurance set out in the declaration is that the company, within sixty days after the insured shall have notified the company of the fire in writing, or furnished it a sworn statement on request, St. 1910, c. 552, "shall either pay the amount for which it shall be liable, which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided," or replace the property, or rebuild or repair the property. Only the first of these three alternative courses open to the insurer has any bearing upon the present case.

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The obligation to pay thus becomes operative within sixty days from a date easily susceptible of accurate ascertainment. The way "hereinafter provided" for determining the amount of the insurer's liability is that, in case of failure of the parties to agree, "the amount of such loss shall be referred to three disinterested men" chosen in a manner designated and that "the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss." It is to be observed that the obligation of the insurer to pay is not within sixty days after the return of the award as is that of the present New York standard form. See *Hanley* v. *Ætna Ins. Co.* 215 Mass. 425. It is within sixty days after the notice of the fire or the furnishing of the sworn statement when that is demanded. The obligation to pay ripens at that time even though the precise amount may not then have been ascertained. The contract is unmistakably imperative in its provision that the amount of loss of the insured under the policy or of liability of the insurer be fixed either (1) by agreement of parties, or (2) by the award of referees, or (3) inferentially it may be determined by an action in the courts when the award by referees is waived. Where the parties are unable to agree and the reference is not waived, then there can be no recovery according to the contract except for the amount fixed by the award. This is a valid provision. It is not an arbitration of the whole controversy, but only a stipulation that the amount of the damage shall be ascertained summarily. It is a lawful agreement and is not obnoxious to the principle that contracts to oust courts of their jurisdiction are not binding. *Reed* v. *Washington Ins. Co.* 138 Mass. 572. *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 171 Mass. 433, 434.

It is to be noted, also, that, although the amount of liability or loss must be fixed by reference, the return of the award or the making of a valid award is not "a condition précedent to any right of action in law or equity to recover for such loss." It is "the reference" to these distinterested men and not "the award" by them which is made the condition precedent. Here again the instant policy differs from other insurance contracts

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which have been before the courts. Many forms require the award as a condition precedent. That was the requirement of the policy in *Hutchinson* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 143, 144. See, for example, also *Hamilton* v. *Liverpool & London & Globe Ins. Co.* 136 U. S. 242; *Commercial Union Assurance Co. Ltd.* v. *Dalzell*, 127 C. C. A. 241; *Scott* v. *Avery*, 5 H. L. Cas. 811, 845, 851; *Caledonian Ins. Co.* v. *Gilmour*, [1893] A. C. 85, 90, 96; *Spurrier* v. *LaCloche*, [1902] A. C. 446; *Jureidini* v. *National British & Irish Millers Ins. Co. Ltd.* [1915] A. C. 499, 505, 506; *Wolff* v. *Liverpool & London & Globe Ins. Co.* 21 Vroom, 453; *Early* v. *Providence & Washington Ins. Co.* 31 R. I. 225; *Nurney* v. *Fireman's Fund Ins. Co.* 63 Mich. 633; *Vernon Ins. Co.* v. *Maitlen*, 158 Ind. 393. The short limitation embodied in the policy is that no action or suit shall be sustained unless commenced within two years from the time the loss occurred, without a clause sometimes found in policies of fire insurance, to the effect that the time consumed in arbitration shall be excluded from the period of limitation for bringing an action. This provision rebuts the idea that the right to bring an action must be suspended until after an award. *Clover* v. *Greenwich Ins. Co.* 101 N. Y. 277, 281. It is conceivable that, in the event of controversy between the parties as to the binding force of an award, the time for bringing an action might elapse before an authoritative decision could be obtained. Hence, it is in the interest of justice and fair dealing between the parties that a reference in accordance with the contract of insurance should be the condition precedent to the bringing of an action, and not a valid and binding award.

The "reference" or "the appointment of arbitrators" as the condition precedent of the policy, often has been referred to in our cases. *Union Institution for Savings* v. *Phoenix Ins. Co.* 196 Mass. 230, 236. *Hanley* v. *Ætna Ins. Co.* 215 Mass. 425, 431. *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 171 Mass. 433, 434. In the opinion in the latter case, it was said at page 435: "The policy does not provide that no action shall be brought upon it until or unless (which are the words more commonly signifying a condition precedent) the amount has been ascertained by arbitration." There is nothing in the decision of *Weisman* v. *Firemen's Ins. Co.* 208 Mass. 577,

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at variance with the conclusion here reached. It was assumed as the basis of that decision that the terms of the policy there in question required as a condition precedent to a right of action that the amount of the loss should be ascertained. This assumption was correct and imperative on the record because it had been so ruled in the Superior Court and there were no facts in the bill of exceptions which showed it to be wrong. An examination of the original papers in that case discloses that the terms of the policy were not stated in the bill of exceptions and that it did not appear whether the policy was issued within or without the Commonwealth, nor whether it was in the Massachusetts standard form or not. The assumption made in that opinion that the policy was issued under R. L. c. 118, § 60, was not necessary to the decision.

The declaration is not defective in failing to allege a valid award. It sets forth a reference, which is the only condition precedent, and a reason why the plaintiff is not bound by the award actually made.

There is the further material and decisive allegation that the plaintiff has offered to resubmit to referees the amount of its loss, but the defendant has refused a new reference and insists upon the validity of the award already made, and has waived further reference. Although the allegation in this regard is not as plain as it might be made, it seems to us as matter of interpretation to mean that the defendant refuses to resubmit the matter of loss to the same referees, and refuses to join in a new reference to another board of referees. Therefore, according to the allegations of the declaration the plaintiff has done all in its power to procure a good award. Hence, the case at bar is distinguishable from *Thorndike* v. *Wells Memorial Association*, 146 Mass. 619. This is not a case where on the allegations of the declaration there has been one attempt at reference only and then an action brought on the theory that the requirement of the policy for reference is complied with, although the insured is ready for another reference or further hearings before the same referees. The parties are at a clear and exact issue as to the validity of the award resulting from this reference, the plaintiff saying that it is bad and offering to have another, while the defendant insists upon it and says it is valid, and refuses to join in further proceedings looking

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toward another reference or another award. This issue must be decided. If the plaintiff is wrong in its contention as to the invalidity of the award, the amount which it can recover already has been fixed. If the defendant is wrong in its contention, it must be presumed to be ready to have its liability determined in this proceeding, having according to the allegations waived a further reference.

The plaintiff's cause of action in any event is the policy of insurance and not the award. The award, if valid, is simply the evidence as to damage or loss. *Soars* v. *Home Ins. Co.* 140 Mass. 343. There is no occasion, therefore, for resort to equity in order to determine whether the award should be set aside. That question can be determined in the action at law. It is analogous to the determination of questions arising upon an auditor's report. It is the law of this Commonwealth that "an award may be impeached at law for mistake of fact of the arbitrator not appearing on the face of the award but proved by extrinsic evidence." *Barrows* v. *Sweet*, 143 Mass. 316. There are numerous cases to the effect that the whole matter may be determined in an action on the policy. *Sullivan* v. *Traders' Ins. Co.* 169 N. Y. 213. *Canfield* v. *Watertown Fire Ins. Co.* 55 Wis. 419. *Davis* v. *Atlas Assurance Co.* 16 Wash. 232. Those decisions appear to rest upon code provisions rather than upon general juridical principles. While apparently the contrary rule prevails in many other jurisdictions, an examination of the cases shows that in most instances the award rather than the reference is a condition precedent to the action, and hence a plaintiff cannot go forward without alleging and proving the award.*

However it may be elsewhere, our own practice is well settled. Its origin is in the circumstance that in our early jurisprudence the chancery powers of the courts did not authorize the vacation or correction of an award; and hence, in order to prevent a fail-

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* *Garrebrant* v. *Continental Ins. Co.* 46 Vroom, 577, 584. *Michels* v. *Western Underwriters' Association*, 129 Mich. 417. *Continental Ins. Co.* v. *Garrett*, 60 C. C. A. 395, 399. *Fire Association* v. *Allesina*, 45 Ore. 154, 158. *Early* v. *Providence & Washington Ins. Co.* 31 R. I. 225, 230. *Dixie Fire Ins. Co.* v. *American Confectionery Co.* 124 Tenn. 247, 291. *North British & Mercantile Ins. Co.* v. *Lathrop*, 17 C. C. A. 175. *Georgia Home Ins. Co.* v. *Kline & Co.* 114 Ala. 366, 371.

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ure of justice, the merits of an award were examined in actions at law. *Bean* v. *Farnam*, 6 Pick. 269, 273. *Strong* v. *Strong*, 9 Cush. 560, 568. *Boston Water Power Co.* v. *Gray*, 6 Met. 131. *Mickles* v. *Thayer*, 14 Allen, 114, 122. It is open to the plaintiff, suing on his original cause of action, to show the invalidity of an award, as well as to a defendant, who may offer it in bar to an action on such award. *Rollins* v. *Townsend*, 118 Mass. 224. It is not necessary to determine whether under any circumstances relief against such an award may be had in equity.

Numerous cases have gone to the extent of holding that one appointment of referees satisfies the obligation of a policy quite as strong in its terms as the one here in suit, or even that an insured may recover unless it appears that the award has failed through his fault.* The reasoning and conclusions of these cases are contrary to *Hood* v. *Hartshorn*, 100 Mass. 117, 121, and hence could not be followed. But they support the result here reached.

The argument of the defendant that the plaintiff has accepted and ratified the award by receiving the amount determined to be the value of a part of insured property finds no support in the record and need not be considered.

The declaration sets out a contract of fire insurance and a total loss of the property thereby insured together with compliance with the condition precedent to the effect that there must be a reference of the loss to referees, and averments that their award is invalid, an offer of the plaintiff to proceed to a new arbitration, and refusal to join therein by the defendant and insistence on its part of the validity of the award already made. This sets out a cause of action on the policy. *Christianson* v. *Norwich Union Fire Ins. Society*, 84 Minn. 526. *Young* v. *Ætna Ins. Co.* 101 Maine, 294. *Fire Association of Philadelphia* v. *Appel*, 76 Ohio St. 1. *Bernhard* v. *Rochester German Ins. Co.* 79 Conn. 388, 396.

Questions as to the further procedure in view of what has been decided have not been argued and are not now before us.

Judgment reversed.
Demurrer overruled.

* *Western Assurance Co. of Toronto, Canada* v. *Decker*, 39 C. C. A. 383. *St. Paul Fire & Marine Ins. Co.* v. *Kirkpatrick*, 129 Tenn. 55, 65. *Shawnee Fire Ins. Co.* v. *Pontfield*, 110 Md. 353. *Jerrils* v. *German American Ins. Co.* 82 Kans. 320. *Pretzfelder* v. *Merchants Ins. Co.* 124 N. C. 164, 165.

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RALPH S. BARTLETT & another, trustees, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & others.

Suffolk. March 19, 1915. — July 3, 1915.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, Suit by stockholder of corporation to procure enforcement of liability of directors. *Corporation,* Liability of directors.

A suit in equity by a stockholder in a corporation alleged to be brought in behalf of himself and all other stockholders who desire to join, to compel the enforcement by the corporation of the liabilities to it of some of its present and former directors by reason of alleged negligence and misconduct in the management of the affairs of the corporation whereby great losses have been incurred, cannot be maintained without alleging and proving a reasonable application to the directors of the corporation to institute proceedings to recover the losses referred to or alleging and proving facts which show that such an application would have been useless.

It seems, that, if such an application to the directors fails or would be useless, the aggrieved stockholder must resort to the stockholders and make an honest attempt to convince them that action ought to be instituted, unless there is an adequate reason for not doing this.

In a suit in equity by stockholders in a railroad corporation to compel the enforcement by the corporation of the liabilities to it of some of its present and former directors by reason of alleged negligence and misconduct in the management of the affairs of the corporation whereby great losses had been sustained, where the allegations of the bill set forth no facts showing that the plaintiffs before filing their bill had made any genuine and substantial effort to induce action by the directors with a real purpose of bringing about that result, and there was no allegation of any attempt to bring the wrongs of which complaint was made to the attention of the stockholders, and where, as an attempted excuse for the failure of the plaintiffs to move the directors to action in behalf of the corporation, it was alleged that the directors of the defendant were twenty-three in number, that ten of the individual defendants "are still directors of said corporation and influential in its councils. Said defendants and other directors closely associated and affiliated in financial matters constitute a majority of the board of directors and control the action and policy of the corporation," it was *held,* upon demurrer, that the bill contained no allegation of facts showing that a demand upon the directors for action would have been useless, and on that ground the demurrer was sustained.

RUGG, C. J. This is a suit in equity brought by certain stockholders in the defendant corporation, in behalf of themselves and all other stockholders who desire to join, to enforce liabilities which are alleged to have accrued in its favor against some of its

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present and former directors.* The defendants are the New York, New Haven, and Hartford Railroad Company, hereafter referred to as the corporation, certain individuals who either now are or have been directors of the corporation, and the personal representatives of certain deceased directors. The grounds upon which this liability is alleged to rest are negligence of the directors of the corporation in its management, whereby purchases of street railway companies, steamboat lines and railroads at prices vastly in excess of their real value have been made with the moneys of the defendant corporation, and the investment of large sums in ventures *ultra vires* the defendant corporation, and the establishment of a monopoly in contravention of the Sherman anti-trust act, all through the misconduct of these directors, to the great loss of the corporation.

A stockholder of a corporation has no personal right of action against directors who have defrauded it and thus affected the value of his stock. Such wrongs are against the corporation itself and, except through that, have no relation to the stockholder. It is the corporation alone whose interests are directly concerned, whose rights are to be asserted, and to whose exclusive use the judgment, if recovered, must be paid. *Converse* v. *United Shoe Machinery Co.* 185 Mass. 422; *S. C.* 209 Mass. 539. The averments of the first paragraph of the bill, while not specific in this respect, when read in conjunction with other averments and especially with the fourth prayer, are that the plaintiffs bring the bill entirely for the benefit of the corporation and not in their own interest except as indirectly they may profit by having money wrongfully taken from it restored to the corporation.†

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* The case was reserved by *Carroll*, J., for determination by the full court.

† The averments of the first paragraph of the bill were as follows: "The plaintiffs . . . bring this suit in order to enforce certain liabilities which they are informed and believe have accrued in favor of the corporation against certain of its present and former directors, which claims said directors and the corporation have hitherto failed and neglected and now decline to prosecute. They bring suit in behalf of all the stockholders of said corporation who may desire to join therein and become parties thereto."

The fourth prayer of the bill was as follows: "4. That upon hearing an account be taken of the amount or amounts legally due from the defendants

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Demurrers have been filed founded on the omission of the plaintiffs to aver that the directors have failed to act after a reasonable demand made upon them to act, or that such a demand would have been useless.

A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. That is a condition precedent. Facts showing that he has complied with this condition must be set forth in unmistakable terms in his bill. He must make an earnest and sincere and not a feigned or simulated effort to induce the managing officers of the corporation to take remedial action in its name. If he fails in this quarter, unless there is adequate reason to the contrary, he must resort to the stockholders and make an honest attempt to convince them that action ought to be instituted. Directors and the majority of stockholders are presumed to be acting, not fraudulently, but with fair discretion in obedience to law, and in good faith toward all concerned, and with a consciousness of duty toward the corporation and all its stockholders. It is an implied condition of becoming a stockholder in a corporation that its general policy shall be determined by the holders of a majority of the stock and that disagreements as to its dominating policy and as to the details of its management shall be settled by the stockholders, and that recourse cannot be had to the courts to adjust difficulties of this sort. It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of the corporation can be maintained by a stockholder. As was said in *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, at pages 496, 497: "Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress for supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere." *Hawes* v. *Oakland*, 104 U. S. 450. *Wathen*

or each or any of them to the corporation defendant, and that a decree be entered ordering and requiring the payment to the corporation of the amount or amounts thus found due."

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v. *Jackson Oil & Refining Co.* 235 U. S. 635, 639. The same principle is applied to unincorporated organizations and beneficiary corporations. *Hickey* v. *Baine*, 195 Mass. 446. *Correia* v. *Portuguese Fraternity*, 218 Mass. 305, 309.

The allegations of the bill upon this point are that the plaintiffs have caused to be sent to each of the directors now in office a letter touching some of the wrongs complained of and asking for notice of their decision respecting it. It is alleged that there are twenty-three directors, two living in Pennsylvania, one in Rhode Island, three in New York, four in different parts of Massachusetts, and thirteen in various cities and towns in Connecticut. The letter was mailed in Boston on Friday, July 10, 1914. The bill was filed in court a week later, on Friday, July 17, 1914. Although it is not alleged how the letter was directed, the most that can be assumed is that it reached each of the directors on the following day, Saturday. Only five business days thereafter intervened before the bill was filed. It requires no discussion to show that such notice and request, even if sufficient in form, was entirely too short in time for any practical purpose. A meeting of a board so large, composed of members whose residences are so widely separated as these, hardly could have been held, unless previously called, much, if any, before the suit was brought. The magnitude of the claims made, the length of time during which it is alleged that the wrongs to the corporation were perpetrated, and the intricacy of the separate transactions and the subterfuges alleged to have been resorted to by the guilty directors in their efforts to conceal the true nature of their conduct, all as set forth in the bill, manifestly rendered it impossible for any board of directors, however honest and alert, to make even a superficial examination of the matters set forth in the letter. The letter in direct words suggests an investigation as to "suspicious circumstances" which "may disclose proof of fraudulent participation by directors in secret and illegal profits, or other forms of fraudulent maladministration." By fair implication it suggests other investigations, which even with the utmost expedition could not have been completed except after the lapse of some time. Moreover, the letter invites from the directors "notice of your decision as to compliance" with the letter. A bald acknowledgment of the receipt of such a letter scarcely could have been

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reasonably expected, — certainly no notice of collective decision as to a course of action to be pursued regarding its subject matter, — before the suit actually was instituted. The bill does not allege that no action was taken by the directors in response to the letter, nor that no answer was received by the writers. It is quite consistent with all its allegations that a meeting of the directors was held, notwithstanding the shortness of time, at which the letter was referred to competent counsel and notice thereof sent to the writers of the letter. An affidavit pretty nearly to that effect, printed in the record, is not attached to nor referred to in the bill, but was filed later, and hence cannot be treated as rightly before us: but the existence of such facts is not at all incompatible with the bill. It is not necessary to consider whether the letter contained sufficient information and was a demand adequate in form to be the basis of an individual suit by a stockholder. Making all assumptions in its favor, it is too plain for further discussion that the plaintiffs do not allege any facts which show that they have made a genuine and substantial effort to induce action by the directors with a real purpose to bring about that result before filing their bill. There is no ground for the argument that the bill shows reason for haste. The record is bare of any facts indicating that the rights of the plaintiffs or of the corporation would have been adversely affected by waiting a reasonable time to afford the directors opportunity either to institute proceedings or to refuse to do so. The statement of the bill that "the plaintiffs aver upon belief that the present board of directors will not cause the defendant corporation to institute action against some of their own members, or cause proceedings to be prosecuted as the interests of the corporation itself require," is an unavailing allegation unless supported by facts showing adequate foundation for such belief. There are no such facts set out in this bill.

There is no allegation of any attempt to bring the wrongs of which complaint is made to the attention of the stockholders.

A bill may be maintained by a stockholder in behalf of the corporation to redress wrongs done to it without making any demand upon the directors or upon the stockholders to cause the corporation itself to institute proceedings, provided it appears by appropriate allegations that that would have been an idle ceremony. The law in this regard is settled. The allegations of the bill must

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be certain and unmistakable in setting forth facts which show that it would have been useless to ask the directors or the corporation to act. Generalities unaccompanied by specific and definite facts are not enough. The sufficiency of the present bill in this regard best may be tested by comparison with the leading case, *Brewer* v. *Boston Theatre*, 104 Mass. 378, a case similar in all essential respects. That was a bill in equity by minority stockholders brought to recover for frauds perpetrated by directors against the corporation. It was alleged that three of the directors, who were defendants, were still members of the board of directors which consisted of seven, and "that a majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of," the two former directors responsible for the frauds; and further, that the present directors "have allowed themselves to become little else than the creatures" of the corrupt directors "and the registers of their wishes, and have come to consider that no duty rested or now rests upon them as directors to do more or other than to make said corporation, and the property of the plaintiffs therein invested, serviceable to" the corrupt directors. This statement of facts was accompanied by allegations of "undue influence, corruption, negligence, fear and fraud" exercised by the guilty directors during the period of their unlawful transactions. It was held that these allegations were not sufficient for the reason that the defendant directors were a minority of the board as then constituted, and that it did not appear that the majority were "wilfully disregardful of the interests of the corporation" and that the allegations were not equivalent to "a request and refusal of the use of the corporate name and authority for the redress of the wrongs complained of," nor do they "show that such an application, upon a suitable representation of the facts, would be unavailing." 104 Mass. 388. After the first decision in *Brewer* v. *Boston Theatre*, from which quotations have been made, the bill in that case was amended to the extent of averring that a majority of the board of directors were fully cognizant of all the breaches of trusts and frauds committed by the faithless directors upon the corporation and openly excused and justified the same, and had been and "are now knowingly, wilfully and fraudulently endeavoring, in collusion with" such faithless directors "to secure and continue the control of the said

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corporation and its property" for the private benefit of the faithless directors, "and in fraud of the stockholders and the corporation." These allegations were held sufficient to authorize a single stockholder to proceed. 104 Mass. 391, 393.

Brewer v. *Boston Theatre*, 104 Mass. 378, always has been recognized as a leading and authoritative decision. It is exhaustive in its discussion. There has been no relaxation of the rule there laid down. On the contrary it has been strictly adhered to. It was followed in *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495. In that case it was not alleged that the individual stockholder had attempted to move the directors to action in behalf of the corporation, but as excuse for this failure it was averred that one of the directors was president and treasurer of the corporation and was and had been for a long time the owner or controller of a majority of shares of its capital stock, and had improperly managed the corporation and wrongfully received to his own benefit large amounts of its money for salary and rent. There was no allegation of fraud, or of wrongful combination by this director with any others, or misconduct on the part of any of the others. It was held that it could not be presumed, in the absence of such averments, that the directors would refuse to do their duty in behalf of the corporation if they were asked to do so. To the same effect are *Doherty* v. *Mercantile Trust Co.* 184 Mass. 590, *Enos* v. *Church of St. John the Baptist*, 187 Mass. 40, 43, *Young* v. *Haviland*, 215 Mass. 120, 123, *Von Arnim* v. *American Tube Works*, 188 Mass. 515, 517, *Wineburgh* v. *United States Steam & Street Railway Advertising Co.* 173 Mass. 60, 62, *Richardson* v. *Clinton Wall Trunk Manuf. Co.* 181 Mass. 580. The record in *Hill* v. *Murphy*, 212 Mass. 1, which was said to be "somewhat meagre," showed far more effort to move the directors to action than is disclosed in the case at bar. *Hawes* v. *Oakland*, 104 U. S. 450. *Quincy* v. *Steel*, 120 U. S. 241, 247. *Doctor* v. *Harrington*, 196 U. S. 579, 588.

The present bill is like the bill in *Brewer* v. *Boston Theatre*, which was held insufficient, and is singularly unlike the amended bill, which there was held sufficient. The present bill avers that ten individual defendants "are still directors of said corporation and influential in its councils. Said defendants and other directors closely associated and affiliated in financial matters constitute a majority of the board of directors and control the action and policy

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of the corporation." This is far from an averment that the ten defendant directors who have perpetrated the alleged wrongs against the corporation are in corrupt confederation with others of their associates in numbers sufficient to control the action of the board. Much less is it an averment that the thirteen directors (other than those named as defendants), two of whom are alleged to have been directors since 1910, three since 1911, and the rest since 1913, are in collusion with the faithless directors. Thirteen out of the twenty-three directors are not alleged to have been guilty of any wrongful acts toward the corporation, nor are any facts averred to "show that they are wilfully disregardful of the interests of the corporation" or that they "would yield to the influence or control" of those who have been guilty of negligence or *ultra vires* acts, if aware of the purposes to which that influence and control is exerted. The extent of the relation of any of the directors to those upon whom it is sought to fasten liability is that certain unnamed "other directors" are "closely associated and affiliated in financial matters" with them. This averment would be satisfied by the fact that they are together on a board of directors of a corporation involving financial interests of the magnitude of those vested in the New York, New Haven, and Hartford Railroad. Such service may constitute close association and affiliation in financial matters. There is nothing sinister or corrupt in the single fact of association or affiliation in financial matters. There must be some further fact before there is anything wrong about it. "Affiliation . . . in the same church" with a party to an action is no disqualification to a juror. *Searle* v. *Roman Catholic Bishop of Springfield*, 203 Mass. 493, 498. Service upon the same board of directors does not of itself make honest men truckle to the dominating influence of a corrupt minority merely by reason of being thus "closely associated and affiliated in financial matters." It is not the equivalent of saying that the majority refuses to act in the interests of the corporation by reason of tainted subserviency, or that it endeavors intentionally and intelligently to screen the guilty directors from their just responsibility to the corporation or that otherwise it is faithless to the trust resting upon directors. Allegations of this nature are wholly absent from the present bill. Unless *Brewer* v. *Boston Theatre* is overruled, plainly this bill cannot be maintained on its present allegations. This case is indistinguish-

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able from that. In its material averments in this respect the bill at bar is like that there held fatally defective, and omits those there held essential. The allegations of the paragraph to the effect that the guilty directors with other directors closely associated and affiliated in financial matters with them constitute a majority of the board and control the action and policy of the corporation, are not rendered sufficient by regarding them as supplemented by the averments of a preceding paragraph, in substance that the information contained in the official investigations and decisions, and all the records and accounts of the defendant corporation and its subsidiaries have been open and accessible to the directors, and that it was their duty within a reasonable time to cause to be instituted appropriate proceedings for the recovery of the sums for which the individual defendants and the estates of deceased directors are liable to the corporation, and that the "extent of the actual knowledge" which has come to the present directors is "unknown to the plaintiffs." Although this allegation is directed to a different proposition and is not pleaded in support of excuse for failure to move the directors to action, yet, if all the averments are combined, they fail to show any excuse for failure to give the directors reasonable time to act after the application, before instituting the present suit.

This rule of law, recognized forty-five years ago after full consideration in *Brewer* v. *Boston Theatre*, 104 Mass. 378, has been steadily followed here and prevails generally. See 10 Cyc. 966, 967, for a collection of cases. It is not a technical rule of pleading, but one of substantive right. If the majority of the board of directors of a corporation are incorruptible, free from collusion with wrongdoers, and ready to act for the best interests of the corporation, there is no reason why an individual stockholder should be permitted to involve the corporation in lawsuits. As was said by Knowlton, J., in *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, 497: "It would be contrary to the fundamental principles of corporate organization to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due to it, or to prevent methods of management which he thinks unwise." Unless a plaintiff in equity is ready to state in court that he knows or that he is informed and believes and therefore avers the truth of the essential facts re-

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specting the directors which show either that they have refused to act when asked to act or that it would be useless to make application to them, there is no reason why litigation should be undertaken by him for its benefit. The circumstance that there are general allegations that vast sums of money have been lost to the defendant corporation can make no difference in application of the governing principles of law.

It follows that the bill is fatally defective in this respect and the demurrers must be sustained on this ground. It is unnecessary at this time to consider any of the other numerous questions raised at the argument. Let the order be, demurrers sustained on the ground that the bill does not allege reasonable application to directors to institute proceedings to recover losses referred to in the bill, nor facts showing that such application would have been useless.

So ordered.

S. L. Whipple, W. R. Sears & A. Lincoln, (*E. H. Abbot, Jr.,* with them,) for the plaintiffs.

J. L. Thorndike, (*R. G. Dodge* with him,) for the New York, New Haven, and Hartford Railroad Company.

F. H. Nash, (*C. F. Choate, Jr.,* with him,) for the defendants Mellen and Pratt.

E. P. Saltonstall, (*C. W. Blood* with him,) for the executors of the will of Amory A. Lawrence.

C. K. Cobb, for the defendant Cochrane.

E. A. Whitman & R. Victor of New York, (*E. H. Green* of New York with them,) for the defendants Skinner, Brooker and Elton.

C. A. Hight, for the defendant Rockefeller.

J. B. Warner, for the executors of the will of J. P. Morgan, submitted a brief.

O. Ray, for the trustee under the will of I. DeVer Warner, submitted a brief.

C. Bassett, for the executors of the will of Edwin Milner, submitted a brief.

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HELEN S. NICHOLS *vs.* COMMERCIAL TRAVELLERS' EASTERN ACCIDENT ASSOCIATION.

Suffolk. May 20, 1915. — July 9, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Insurance, Accident. *Evidence*, Presumptions and burden of proof, Report of inquest, Of nature of death, Admissible for limited purpose.

At the trial of an action upon a policy of accident insurance providing for the payment to the plaintiff of a certain sum in the event of the death of the insured "wholly and entirely by external, violent, and accidental means," there was evidence tending to show the following facts: The insured was a man about five feet seven inches in height, of large build, weighing about two hundred pounds, and of a contented and normal mind. Sometimes he had slight attacks of indigestion, when he always felt as if he wanted to get to an open window. When he got up to go to a window at night he might stay there five minutes. On the night of his death he had occupied a lower berth in a sleeping car, the berth being made up with the head toward the front of the train. The window at the foot of the bed had been raised and a screen inserted twenty-five inches wide and eighteen inches high, with its lower edge about nine inches above the bed. The upper berth was about thirty-six and a half inches above the bed. The insured was seen in the corridor of the car at two o'clock in the morning. At three o'clock his body was found between tracks in a railroad yard, clad in a portion of a nightshirt and with the skull and cheek bone fractured. His watch, money and ticket were found under the pillow in the berth, his clothing was laid on the shelf and some of his belongings were found in the small hammock in the berth, the end of the hammock nearer the foot of the berth being pulled down and hanging. The screen was found broken and torn from the top and sides of the frame and hanging outside of the car. There were finger marks on the car outside and below the window. *Held*, that a finding was warranted that the insured met his death by external, violent and accidental means.

Where at the trial of an action upon a policy of accident insurance providing for the payment of a certain sum in the event of the death of the insured "wholly and entirely by external, violent, and accidental means," a case of death by violent and external means is made out by the evidence, there is a presumption of fact that the death was not intentional and that the injuries causing it were not self-inflicted; and therefore, although without such presumption the evidence might not be sufficient to warrant a finding that the cause of the death was wholly accidental, it cannot be ruled as a matter of law under such circumstances that the question, whether such cause was wholly accidental, should not be left to the jury.

If, at the trial of an action upon a policy of accident insurance which contained a provision that no indemnity should be paid if the death of the insured resulted from an injury "caused wholly or in part . . . by . . . voluntary exposure to unnecessary danger . . . nor for any injury which the" insured "by the exercise

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of ordinary care, prudence, and foresight, might have averted or prevented, or to which" his "own negligence shall have contributed," the defendant offers evidence tending to exonerate it from liability under that provision, but on all the evidence inferences different from those urged by the defendant reasonably might be drawn, the burden of sustaining the defence urged is on the defendant, and a verdict in its favor cannot be ordered.

If a policy of accident insurance, which originally provided a death indemnity of not more than $5,000, was afterwards amended to provide that, in case of the death of the insured "while riding as a passenger on a passenger train, and inside a passenger car thereof," the amount to be paid should "not exceed $10,000," and the insured thereafter met his death by falling through a window of a sleeping car on a passenger train, the beneficiary under the policy, if entitled to recover at all, may recover $10,000.

Where, in an action against an insurance company for a death indemnity agreed to be paid in a policy of accident insurance which required, as a condition precedent to the payment of the indemnity, that direct and affirmative proof of the death should be furnished to the directors, the defendant, in answer to interrogatories filed by the plaintiff had stated that it received from the plaintiff's attorney a letter, which it annexed, containing a statement of the claim of the indemnity, and that enclosed in the letter was a copy of the report of an inquest into the cause of the death which included a finding that there was no suicidal intent on the part of the insured and which also was annexed to the answers without objection, if the presiding judge subject to the exceptions of the defendant permits the report of the inquest to be read to the jury and instructs them that they should not take the report as evidence of the manner of death or its cause, but should use it solely for the purpose of deciding whether the report, with the other information obtained by the defendant, ought to have satisfied it that the cause of death was an accident within the provisions of the policy, the defendant's exceptions must be overruled, the report having been admissible for the limited purpose for which it was admitted.

CARROLL, J. The plaintiff is the widow of Curtis Nichols and the beneficiary named in a certificate of insurance issued by the defendant, providing for the payment to her of a certain sum in the event of the death of her husband "wholly and entirely by external, violent, and accidental means." He was found dead in the early morning of July 25, 1912, in the railroad yard in West Springfield. At the close of the evidence the defendant requested the judge * to instruct the jury that upon all the evidence as matter of law the jury should return a verdict in favor of the defendant. This the judge declined to do and the defendant excepted. The defendant also requested the judge to give certain other instructions which were refused and the defendant excepted. There was a verdict of $11,164.94 for the plaintiff. The fundamental question is: Was there sufficient evidence that the insured died

* *Lawton*, J.

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from external, violent and accidental means to warrant the submission of the case to the jury?

1. Curtis Nichols was a passenger on a train of the Boston and Albany Railroad Company leaving Boston on the night of July 24, 1912, at 11.15 P. M., for Albany, New York. He occupied the lower berth number five in the sleeping car Kitchawan. There was testimony tending to show that as soon as the train left the South Station in Boston he went "into the smoking room, took off his coat, vest and collar and proceeded to wash;" after he finished he sat opposite a fellow passenger and talked with him on various matters for "about a half or three-quarters of an hour;" he complained of the heat; in a general way he discussed business, and seemed "very normal, very jolly and very hopeful on the outlook." He finally said, he thought "he would be cooler in the sleeper," and that he would go to bed. At about two o'clock the next morning he was seen by the Pullman conductor "coming from the gent's toilet at the end . . . towards the rear of the train." An hour later, about three o'clock on that morning, his dead body was found about twenty or twenty-five feet west of the dry bridge over Main Street in West Springfield, lying with the head toward the east, between the two main tracks. A part of his nightshirt was "on the right side of the body under the arms and the body." His skull and cheek bone were fractured. The bed in lower berth five was made up in the usual way, with the head toward the engine; a window at the rear or foot of the berth was open and in its place there was a wire screen enclosed by a frame. The space inside the frame of this screen was between twenty-four and twenty-five inches wide and eighteen inches in height. When the train reached Pittsfield, about 4.10 in the morning, it was found that the bed had been occupied and the bed clothes pushed down from the head. His watch, money and ticket were found under the pillow. His clothing was laid on the shelf. Some of his belongings were found in the small hammock on the inside of the berth, and the east end of this hammock, or the end toward the rear of the train and in front of the open window, was pulled down and hanging loose. The wire screen was found to be broken and torn from the top and sides of the frame, hanging on the outside of the car. Marks, resembling finger marks, were found on the outside of the car below the window. The window sill was about eight

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inches higher than the bed, the lower edge of the wire screen about one inch higher than the window sill, and the upper berth was about thirty-six and one half inches above the bed as made up in the lower berth.

There was evidence that before reaching Springfield the train was "jerky" in stopping and starting, but all the testimony tended to show that at the place where Nichols was found, which was about half a mile west of Springfield, the train was running smoothly, with no unusual jerk or jolt, at the rate of about twenty-five to thirty-five miles an hour, on a level grade where there was a slight curve. While it was warm during the day it grew cooler toward night, and weather observations taken at Boston showed that at two o'clock on the morning of July 25 the weather was clear and the temperature 61°, and at three o'clock it was 60°. Mrs. Nichols testified that her husband suffered "from the heat or shortness of breath, and that when it was excessively hot . . . he could not stay in a closed room; . . . sometimes he had slight attacks of indigestion, and then he always felt as if he wanted to get to the open window; . . . that when her husband would get up and go to the window at nights he might stay there probably five minutes;" that he "was a wonderfully happy person; never had fits of melancholy or moroseness, or anything of that sort;" and several letters from the assured to his wife and children were in evidence, indicating a normal and contented mind.* Nichols left word to be called at half past five o'clock in the morning, the train being due to arrive at Albany at 6.15 A. M.

On such evidence, especially from the place where the body was found, from the marks upon it and the fractured skull and cheek bone, the jury would be fully justified in finding that Nichols met his death because of external and violent means; and further, that in some unexplained way he fell against, or threw himself against, the screen in such a way that it became broken and he fell from the berth to the ground. When a man is found dead under such circumstances, when the marks on the body show the cause

* In cross-examination the plaintiff testified "that her husband was approximately five feet, seven inches tall, and weighed probably two hundred pounds; in build he was very large; his feet were small, but his legs were very large, and his arms were large; his body also was large."

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of death and all the circumstances exclude the theory of disease or injuries intentionally inflicted by a third person, it may be inferred that the death was accidental and was not the result of intention or design. When a case of death by violent and external means is made out, the presumption of fact is that because of the external and violent nature of the injuries the death was not intentional and the injuries not self-inflicted. The way in which the assured fell through the screen may be uncertain and conjectural. He may have been leaning against it for fresh air; — being a heavy man weighing two hundred pounds — he may have been trying to remove the screen, to close the window; intentionally or negligently, he may have pushed out the wire and thrown himself from the train; but the plaintiff is entitled to the presumption that her husband did not kill himself, that is to say, the jury might draw such an inference; and having that presumption of fact in her favor, no matter how strongly we may agree with the defendant on the question of fact, we cannot say as matter of law that the question of accident was not properly submitted to the jury. The presumption which the jury could make against intentional self-destruction sustains the burden resting on the plaintiff and makes her case a proper one for the consideration of the jury. *Bohaker* v. *Travelers Ins. Co.* 215 Mass. 32. *Coburn* v. *Travelers' Ins. Co.* 145 Mass. 226. *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661. *Supreme Tent Knights of Maccabees of the World* v. *King*, 73 C. C. A. 668. *Zearfoss* v. *Switchmen's Union of North America*, 102 Minn. 56. *Wilkinson* v. *Ætna Life Ins. Co.* 240 Ill. 205.

In *Standard Life & Accident Ins. Co.* v. *Thornton*, 40 C. C. A. 564, the facts were in many respects similar to the facts in the case at bar. In that case the insured was a passenger on a night train leaving Memphis, Tennessee, at 9 P. M., for Jasper, Alabama, where he expected to arrive at four o'clock the next morning. He was seen sitting in his berth in the sleeping car at twelve o'clock. This was the last seen of him alive. At 3.25 A. M. the porter went to call him and found the berth empty. Later the dead body of the insured was found beside the railroad track, three and one half miles from Jasper. From what part of the train he fell, or how he fell, or what he was doing when he fell, was entirely in doubt and was a matter of conjecture. In an action to recover on an accident

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policy covering death from external, violent and accidental means, the plaintiff had a verdict, and Day, J., speaking for the court, said (p. 567): "There is nothing in the testimony to warrant the court . . . in interfering with the conclusion reached by the jury. They may well have reached the determination that the testimony did not warrant the inference of suicide, and, though unable to find exactly the manner in which decedent was taken off, the facts could have been reconciled with the theory of accident more readily than that of suicide, giving the plaintiff the benefit of the presumption against self-destruction."

Where, under a policy like the one before us, all the facts showing death by external and violent means are in evidence and the only reasonable inference to be drawn from them is the inference of death by design, volition or intention, then as matter of law there is no question of accident for the jury to consider. But where all the facts are not disclosed, or where they are in dispute, so that opinions properly may differ as to the conclusions to be drawn from them, then it is the province of the jury to pass on them and to decide whether the death is the result of accident or design.

In the case last cited it does not appear from what part of the train the deceased fell, and in the case at bar it does appear that the insured fell through the screen in the window of his berth. In our opinion this circumstance is not enough to distinguish the two cases.

In the present case there are not sufficient facts before us to assure us in deciding that the only reasonably just conclusion from them is that of suicide or death under some of the prohibited risks of the policy. In the ordinary negligence case, like those cited on the defendant's brief, where the burden of proof is on the plaintiff and the matter is conjectural, with no decisive evidence showing the plaintiff's care or the defendant's negligence, there is as matter of law no question for the jury, because the burden resting upon the plaintiff has not been sustained. Here there is a presumption, in the plaintiff's favor, of death by accident, although it is merely a presumption of fact and not of law; and while the burden is upon her to establish the external, violent and accidental cause of her husband's death, this inference in her behalf makes her case a proper one, so far as the law is concerned, for the jury to pass on.

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We therefore think that there was no error in leaving the question to the jury.

2. The policy stipulated that no indemnity was to be paid if death resulted from an injury "caused wholly or in part . . . by . . . voluntary exposure to unnecessary danger, . . . nor for any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed."

If these conditions of the policy are broken there can be no recovery thereunder; if the deceased met his death by reason of his own want of care or his voluntary exposure to unnecessary danger his widow is not entitled to a verdict against the defendant. These provisions of the policy are exceptions preventing a recovery if they are violated, but because they are exceptions barring the member from recovering judgment, and causing a forfeiture of the policy, they are matters of affirmative defence and must be alleged and proved by the defendant.

Under similar language, in a policy of insurance, it is settled that the burden of showing that the death or injury was within the excepted or prohibited risks of the policy is upon the defendant. *Garcelon* v. *Commercial Travellers' Eastern Accident Association*, 195 Mass. 531. *Anthony* v. *Mercantile Mutual Accident Association*, 162 Mass. 354. *Keene* v. *New England Mutual Accident Association*, 161 Mass. 149. *Badenfeld* v. *Massachusetts Mutual Accident Association*, 154 Mass. 77. *Coburn* v. *Travelers' Ins. Co.* 145 Mass. 226. *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572.

Where the burden of showing that the insured came within either of these exceptions is upon the defendant, as in the case at bar, and where different inferences might be drawn from the evidence, a question of fact for the jury to pass upon is presented, and the presiding judge could not rule as matter of law that the defendant was entitled to a verdict because the member was guilty of negligence and exposure to danger. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 209 Mass. 105, 110. *Anthony* v. *Mercantile Mutual Accident Association*, and *Garcelon* v. *Commercial Travellers' Eastern Accident Association*, *supra*.

3. As originally written the limit of recovery under the policy was $5,000, but in 1911 the policy was amended by providing, in case of death "while riding as a passenger on a passenger train,

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and inside a passenger car thereof, which train or car was propelled by steam power," that the amount to be paid "shall not exceed $10,000." If the plaintiff is entitled to recover anything, she is entitled to recover $10,000. Her husband was a passenger on a passenger train, in a passenger car, and the train was propelled by steam power. *McKimble* v. *Boston & Maine Railroad,* 139 Mass. 542. *Preferred Accident Ins. Co. of New York* v. *Muir,* 61 C. C. A. 456. *King* v. *Travelers' Ins. Co.* 101 Ga. 64.

4. Following the death of the insured an inquest was held, and in answer to interrogatories of the plaintiff the defendant annexed the report of the inquest showing that there was no suicidal intent on the part of the deceased, together with a copy of a letter from the plaintiff's attorney to the defendant enclosing it with a claim of indemnity under the policy. The judge permitted this report of the inquest to be read to the jury, instructing them that they were not to take the report as evidence of the manner of death or of its cause, but to use it solely for the purpose of deciding whether the report, with the other information obtained by the directors, ought to have satisfied them that the cause of death was an accident within the terms of the policy. Of course the report of an inquest is not admissible as substantive evidence. *Jewett* v. *Boston Elevated Railway,* 219 Mass. 528. This report was received and kept by the defendant, and we think it was admissible in evidence for the limited purpose for which it was offered and for which the jury were to examine it. The policy expressly required that satisfactory proof of the external, violent and accidental means of death should be furnished to the directors; and therefore the report of the inquest was admissible as bearing on this question. *Traiser* v. *Commercial Travellers' Eastern Accident Association,* 202 Mass. 292.

The evidence as to the "proof" submitted by the plaintiff to the defendant might have been found to be such as ought to have been "satisfactory to the board of directors" acting as reasonable men. Upon this point the case is indistinguishable from *Traiser* v. *Commercial Travellers' Eastern Accident Association.*

We have examined all the other requests for instructions* made

* The following rulings were asked for by the defendant and were refused, subject to its exceptions.

"8. There being no evidence of any accident or of any unusual condition

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by the defendant and see no error in the refusal of the judge to give them.

Exceptions overruled.

The case was submitted on briefs.

W. B. Grant & N. L. Sheldon, for the defendant.

S. L. Whipple, A. R. Shrigley & S. T. Crawford, for the plaintiff.

HERBERT M. PLIMPTON & others *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Norfolk. March 24, 25, 1915. — August 3, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Deed, Construction. *Contract*, What constitutes, Construction. *Railroad*. *Practice, Civil*, Refusal of request for ruling. *Words*, "Maintain."

A deed of land to a railroad corporation by the proprietors of a manufacturing establishment, which was given in consideration of an agreement of the railroad corporation, recited that agreement as follows: "As a part of the consideration for this conveyance said Railroad Company, for itself and its successors and assigns, agrees to maintain a connection from the line and tracks of said railroad to a certain track now built on a trestle adjacent to the manufacturing establishment on the adjoining land of said grantors, and to maintain said trestle and the track thereon so long as the said connection

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or occurrence within the car at the time assured went through the window, the jury shall return a verdict for the defendant.

"9. The size of the window screen, through which the assured went, being so small that he could get through only by going at full length, and the space in the berth so small and confined and so situated in reference to said screen that the assured could not fall against the said screen so as to pass through the same without his own violition, sane or insane, the jury is directed to return a verdict for the defendant.

"10. If the jury find that the size of the window screen, through which the assured went, was so small that he could not get through except by going at full length and that the space in the berth was so small and confined and so situated in reference to said screen that the assured could not fall against the said screen so as to pass through the same without his own volition, sane or insane, the jury should return a verdict for the defendant."

"13. Upon all the evidence, the jury can in no event assess damages for a greater amount than $5,000."

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does not interfere with the proper development of the Railroad Company." In an action against the railroad corporation for failing to keep the trestle in repair, there was no evidence that the conditions had changed in any way since the deed was given, and the trial judge found for the plaintiff. *Held*, that the finding was warranted, the defendant by accepting the deed having bound itself to perform the agreement to maintain the trestle under the conditions named which still existed.

In an agreement by a railroad corporation "to maintain said trestle and the track thereon" connecting with a manufacturing establishment, the words "to maintain said trestle" mean to keep up the trestle in a state of strength sufficient to perform the functions obviously required of it by the other terms of the contract, although in the same sentence the word "maintain" is used in a different sense in a stipulation of the railroad corporation "to maintain a connection from the line and tracks of said railroad" to the track on the trestle.

The failure of a judge before whom a case is tried without a jury to pass upon a request for a ruling is equivalent to a refusal to make the ruling.

RUGG, J. C. This is an action to recover the cost of rebuilding a trestle. The controversy is whether the obligation to maintain the trestle rested upon the defendant. All objections as to the form of the action have been waived. It also has been agreed that "the present parties have succeeded to all the rights and liabilities of their predecessors" and hence no question as to parties has been raised or argued. In this opinion the parties and their predecessors without discrimination will be referred to as the plaintiff and the defendant.

In May, 1897, a contract was made whereby the defendant agreed to construct a trestle and lay thereon a track connected with its railroad upon land of the plaintiff, and the plaintiff in consideration thereof "without further compensation" agreed to convey to the defendant a certain tract of land. By deed poll dated a little more than four years and four months later, the plaintiff conveyed the land described in the contract, the deed being recorded about eight months after its date. The deed contained this clause:

"As a part of the consideration for this conveyance said Railroad Company, for itself and its successors and assigns, agrees to maintain a connection from the line and tracks of said railroad to a certain track now built on a trestle adjacent to the manufacturing establishment on the adjoining land of said grantors, and to maintain said trestle and the track thereon so long as the said connection does not interfere with the proper development of the Railroad Company land for purposes of said railroad

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and the business done in connection with said railroad upon said track upon said trestle is sufficient to properly remunerate the Railroad Company for and warrant the maintenance of said connection."

There was a trial before a judge of the Superior Court,* who found in favor of the plaintiff. The case comes here on the defendant's exceptions to the finding and to the refusal of certain requests for rulings.

No contention is made that the conditions named in the deed arose which would relieve the defendant from the performance of whatever duty rested upon it, if any. The defence in substance is that no enforceable contract was made obligating the defendant to maintain the trestle.

1. The general finding for the plaintiff was warranted by the evidence. The agreement to maintain the trestle, being in a deed poll not signed by the grantee, was not a covenant. *Childs* v. *Boston & Maine Railroad*, 213 Mass. 91. But acceptance of the deed by the grantee made it the mutual contract of the parties and the law implied a promise by the defendant to perform the stipulation. *Maine* v. *Cumston*, 98 Mass. 317, 320. *Locke* v. *Homer*, 131 Mass. 93, 102. *Hathaway* v. *Hathaway*, 159 Mass. 584. It is expressly stated that the agreement by the railroad company to maintain the trestle was "a part of the consideration for this conveyance." Acceptance by the grantee of the deed containing this clause was evidence from which it might have been found to be a true statement of the fact. Such an inference is not forbidden by the sentence in the exceptions that "There was no evidence that between the date of the agreement and the delivery of the deed the parties made any further contract with reference to the subject matter or that the conditions changed in any way." This must mean no evidence other than the deed, for that with its stipulation was in evidence. It is conceivable that the written instrument of 1897 by mistake or otherwise did not express the real agreement of the parties and that the correction was made in the deed of 1901. In any event, the deed itself was sufficient to support the

* *Raymond*, J. Among the requests for rulings that were refused by the judge were requests for rulings, that the plaintiff was not entitled to recover, and that the railroad corporation did not agree to maintain the trestle in the sense that it agreed to bear the expense of all repairs on the trestle.

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inference of consideration. The finding for the plaintiff indicates that this inference was drawn by the trial judge and it will not be set aside unless shown by the record to be without support. *Bailey* v. *Marden*, 193 Mass. 277.

2. The agreement was "to maintain" the trestle and track so long as certain conditions obtained. In this connection "maintain" means to keep up in a state of strength sufficient to perform the functions obviously required of it by the other terms of the contract. The word conveys the notion of continuance of conditions. The defendant was bound to make whatever expenditures were required to this end. The agreement to maintain the trestle is in addition to the one to maintain the connection from the tracks of the defendant to those on the trestle. The two do not mean the same thing. See *Boston, petitioner, ante*, 468.

3. There is no ambiguity in the stipulation assumed by the defendant by acceptance of the deed. It is plain and obligates the defendant to maintain the track and trestle, as well as the connection with other tracks.

4. The failure of the judge to pass on certain of the defendant's requests for rulings was equivalent to a refusal. *John Hetherington & Sons, Ltd.* v. *William Firth Co.* 210 Mass. 8, 17.

It follows from what has been said that there was no error of law in the refusals to rule, in the rulings made, or in the general finding for the plaintiff.

Exceptions overruled.

A. W. Blackman, for the defendant.

E. G. Loomis, for the plaintiffs, was not called upon.

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HELEN B. STARKWEATHER *vs.* FREDERICK J. GLEASON.
WILLIAM G. STARKWEATHER *vs.* SAME.

Norfolk. March 25, 1915. — May 22, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Contract, Construction, What constitutes. *Words*, "Any time."

Where a person who was the president and general superintendent of a corporation, by whose advice certain persons had purchased preferred and common shares of the capital stock of the corporation, after such purchasers had called his attention to a decline in the market value of the stock, wrote to them, "any time you feel real worried, why come out and you can get your money to the value you paid for the stock from me," whereupon the purchasers replied, "For the present . . . we will not take advantage of your willingness to protect us, but will wait to see if the value of the preferred drops any further, for if this continues we would not care to retain our small holdings," and where, after an interval of five months during which a receiver for the property of the corporation had been appointed, the purchasers notified the promisor that they accepted his offer and were ready to transfer the shares of stock to him, and he refused to purchase the shares, in an action against him upon his alleged agreement, it was *held*, that the words "any time" contained in the defendant's offer, under the circumstances shown by the undisputed facts, must be construed to mean within a reasonable time, and that the attempted acceptance of his offer after an interval of five months during which the plaintiffs had knowledge of the fluctuating financial condition of the corporation and the decline in the market value of its shares, was too late as matter of law.

TWO ACTIONS OF CONTRACT for the breach of an alleged agreement in writing of the defendant to purchase from the plaintiffs certain shares of the preferred and common stock of the Walpole Tire and Rubber Company. Writs dated April 17, 1914.

In the Superior Court the cases were tried together before *McLaughlin*, J. The alleged contract was contained in a correspondence between the parties, the material portions of which are quoted in the opinion, where also the other material facts are stated.

At the close of the plaintiffs' evidence, the judge ruled that upon all the evidence the plaintiffs were not entitled to recover, and ordered a verdict for the defendant in each case. Thereupon the judge reported the cases for determination by this court. If the

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ruling and the ordering of the verdicts were wrong, judgment was to be entered for the plaintiff in the first case in the sum of $450 and for the plaintiff in the second case in the sum of $900; otherwise, judgments were to be entered for the defendant on the verdicts.

L. A. Brown, for the plaintiffs.

C. G. Metzler, (*J. B. Welch* with him,) for the defendant.

BRALEY, J. The correspondence between the parties would have warranted the jury in finding that the plaintiffs invested money in the preferred and common shares of the Walpole Tire and Rubber Company in reliance on the advice and judgment of the defendant, its vice-president and general superintendent. After they had called his attention to the decline in market value of the stock, he wrote them from the company's office, on March 26, 1913, "any time you feel real worried, why come out and you can get your money to the value you paid for the stock from me." To which they replied, on March 27, 1913, "For the present . . . we will not take advantage of your willingness to protect us, but will wait to see if the value of the preferred drops any further, for if this continues, we would not care to retain our small holdings."

If this had been an unconditional acceptance the transaction would have been closed and the plaintiffs, upon delivery of the certificates, properly indorsed, would have been entitled to the amount invested. It was not, however, until August 26, 1913, after a receiver for the company had been appointed, that they accepted the offer and notified the defendant of their readiness to deliver the stock, but he refused performance.

While the offer to buy was evidently for the purpose of protecting them from loss on the investment, and was not intended by the defendant as a purely business transaction, the words, "any time," do not cover an unlimited period to be measured by the alternating hopes or fears of the plaintiffs, but must be construed as limited to a reasonable time. *Holland* v. *Cheshire Railroad*, 151 Mass. 231, 236. And, the facts not being in dispute, this was a question of law for the court. *Holbrook* v. *Burt*, 22 Pick. 546, 555. The plaintiffs, with knowledge of the fluctuating financial condition of the company, and the corresponding decline in the market price of the stock, having remained inactive

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for five months, we are of opinion that under these circumstances the presiding judge correctly ruled that the option had expired. *Park* v. *Whitney*, 148 Mass. 278.

We find nothing in the remaining contents of these letters that calls for discussion.

By the terms of the report, judgment on the verdict is to be entered for the defendant.

So ordered.

JOHN CORNELLIER *vs.* HAVERHILL SHOE MANUFACTURERS' ASSOCIATION & others.

Suffolk. March 1, 2, 1915. — September 15, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Master's report. *Equity Jurisdiction*, To enjoin blacklisting, Plaintiff must come into court with clean hands. *Labor Union*. *Boycott*, By blacklisting. *Strike*.

Where a suit in equity is referred to a master "to find the facts, and report the same to the court," no exception can be sustained to the refusal of the master to pass upon requests for rulings of law.

A combination of manufacturers of a certain commodity to blacklist the striking employees of another manufacturer of the same commodity, when directed against persons with whom those combining have no trade dispute or when the concerted action coerces the members of the combination by implied threats or otherwise to withhold employment from those whom they otherwise would employ, is on the footing of a boycott and may be enjoined by a court of equity or may afford a ground for recovering damages in an action at law Overruling anything to the contrary in *Worthington* v. *Waring*, 157 Mass. 421.

Discussion by DE COURCY, J., of the test of the legality of strikes and their relation to labor unions.

A suit in equity against certain shoe manufacturers in a certain city, to enjoin them from blacklisting the plaintiff because he took part in a strike against another shoe manufacturer in the same city, cannot be maintained, where it appears that before and for more than three months after the filing of the bill the plaintiff has been taking part in the strike against his employer conducted by unlawful means in which the plaintiff joined that reasonably caused the average employee to be apprehensive for his personal safety; because this unlawful conduct of the plaintiff and his associates precludes him from obtaining the active aid of a court of equity and leaves him to seek redress in an action at law for any damage that he has suffered by reason of the blacklisting.

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BILL IN EQUITY, filed in the Supreme Judicial Court on January 25, 1913, against certain corporations and the members of certain partnerships engaged in the business of manufacturing shoes in Haverhill, to enjoin the defendants from interfering with the plaintiff's right to earn a livelihood, from the use of all black lists or other lists or devices containing the name of the plaintiff, for the assessment of damages and for further relief.

The case was referred to Arthur P. Hardy, Esquire, as master, "to hear the parties and their evidence, to find the facts, and report the same to the court." He filed a report in which he found the facts that are stated in the opinion. Exceptions to this report were filed by the plaintiff and also by the defendants.

The case was heard by *Loring*, J., who made an interlocutory decree sustaining certain of the defendants' exceptions, as stated in the opinion. The case then was recommitted to the master, who filed a supplemental report, and later was heard by *Loring*, J., upon the defendants' exceptions to the master's supplemental report.

The single justice reported the case for determination by this court as follows:

"This case came on to be heard before me on the exceptions taken by the defendants to the master's report.

"It appears from the master's report that on Thursday, December 12, 1912, the employees of the Witherell and Dobbins Company struck, after the increase in wages asked for by them had been granted, because that company refused to deal with the persons chosen by the employees to represent them in making the agreement for the increase in wages, which the company was ready to concede.

"I am of opinion, and I rule, that a strike by union employees for the purpose of being represented in negotiations between them and their employer by the agents they have chosen to select for that purpose, viz., officers of the union, is a legal strike. In my opinion such a strike does not come within *Berry* v. *Donovan*, 188 Mass. 353, and *Plant* v. *Woods*, 176 Mass. 492.

"On the next day, Friday, December 13, 1912, the defendant employers of labor in the same city with the Witherell and Dobbins Company entered into a combination to resist that strike, which, as I have said, was a strike by employees for the purpose

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of being represented by union officials in their dealings with their employer.

"On Monday, December 30, 1912, a general strike was instituted by the employees of shoe shops in Haverhill (in addition to the employees of the Witherell and Dobbins Company) to aid the strike by the employees of the Witherell and Dobbins Company in carrying out the purpose for which they struck, namely, to be represented in dealings with their employer by the agents which they had chosen to select, namely, union officials.

"Referring (1) to the strike by the employees of the Witherell and Dobbins Company on December 12, and (2) to the general combination of the defendant employers of labor in shoe shops in Haverhill of December 13, and (3) to the general strike of December 30 by employees in Haverhill shoe shops, the master found 'that this was a struggle between the manufacturers, on the one hand, to deal with their employees as they saw fit without the intervention of the union, and the demand of the union, on the other hand, for recognition to the extent hereinbefore described; and both parties recognized it as such from the beginning.' The question to be decided is whether that struggle which in fact took place was a legal or an illegal struggle.

"I am of opinion, and I rule, that the purpose of the Witherell and Dobbins strike was not a purpose confined to the employees of the Witherell and Dobbins Company, or to the individual employer in that strike (the Witherell and Dobbins Company), but was (1) a purpose common to employees of other persons who might think it to be for their advantage to have employees, in dealing with their employer, represented by union officials; and (2) a purpose common to other employers who might think it to be for their advantage not to have employees, in dealings with the employer, represented by union officials.

"I therefore rule that the combination of the defendant employers to aid Witherell and Dobbins in resisting the strike of their employees by refusing to employ the striking employees of the Witherell and Dobbins Company was a legal combination, and not a boycott by way of a black list; and I also rule that the general strike by employees of shoe shops other than that of the Witherell and Dobbins Company was a legal strike, and not il-

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legal within *Pickett* v. *Walsh*, 192 Mass. 572, as a sympathetic strike to aid in a trade dispute of a third person.

"If these rulings are correct, the plaintiff cannot complain of the defendants' refusing to employ him either before or after the general strike; the defendants were justified in refusing to give the plaintiff employment, because they had entered into a legal lockout as against the plaintiff.

"There is an additional reason why the plaintiff cannot recover for loss of employment after the general strike which began on December 30, 1912, and this reason would obtain even if the employers' combination of December 13 was an illegal one. An employee who is prevented from getting employment by an illegal black list of employers has two courses of action open to him. First, he can sue for any damages suffered by him, caused by the illegal combination of employers in blacklisting him, or, second, he can become a party to a general strike against all the employers who are parties to the black list. But he cannot do both. If he becomes a party to a general strike against all employers who are parties to the black list, he cannot complain that he is damaged by not being employed by the very persons for whom, by being a party to the general strike against them and others, he has refused to work.

"It is apparent that if my rulings are correct the bill should be dismissed, apart from the correctness or incorrectness of the defendants' exceptions to the master's report, and for that reason I have not considered them. But if these rulings of law are not correct, those exceptions should be considered.

"Under these circumstances I order that a decree be entered confirming the master's report and dismissing the bill of complaint, and I report the case for the consideration of the full court under R. L. c. 159, § 27, or § 29."

The case was argued at the bar in March, 1915, before *Rugg*, C. J., *Braley*, *De Courcy*, *Pierce*, & *Carroll*, JJ., and afterwards was submitted on briefs to all the justices except *Loring*, J.

F. W. Mansfield, for the plaintiff.

J. J. Feely, (*R. Clapp* with him,) for the defendants.

DE COURCY, J. 1. The defendants filed eighty-five exceptions to the original report of the master. The sustaining of the forty-fourth and eighty-fifth rendered necessary a re-committal

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for the purpose of hearing further evidence. The supplemental report is a re-draft of the original one, with certain parts eliminated in consequence of the rulings of the single justice sustaining some of the exceptions, and with the additional findings made on the new evidence. To the supplemental report the defendants filed forty exceptions, and these have come before us without any action thereon by the single justice.

We have considered the large number of objections made and the arguments thereon, and have come to the conclusion that all of the exceptions to the original report, except those sustained by the single justice, and all of those taken to the supplemental report, must be overruled. It would serve no useful purpose to discuss them in detail. Those that deal with the admission and rejection of evidence disclose no reversible error. The findings of fact cannot be reviewed because the evidence has not been reported; and the facts found are relevant to the issues in the case, as clearly stated by the master when dealing with the several objections to his draft reports. The exceptions that relate to the master's refusal to pass upon requests for rulings of law cannot be sustained, because it was the master's duty to find the facts only, and not to rule upon their legal effect.

2. The basis of the plaintiff's complaint is that the defendants conspired against him, and by means of a black list procured his discharge from employment. On December 12, 1912, the plaintiff, with thirty-nine other employees of the Witherell and Dobbins Company, went out on strike. He secured employment at the factory of Charles K. Fox, Inc., on December 14, began work on December 16, at 7.10 A.M., and was discharged in a summary and unusual manner about two hours later. The master finds that the cause of his discharge was the fact that he was one of the striking employees of the Witherell and Dobbins Company, and that there existed a tacit understanding, to which the Fox Company was a party, that those striking employees should not be employed. It appears that on the day of the strike, or the day after, and at the request of the defendant Child (who was the manager of the Shoe Manufacturers' Association), Mr. Dobbins brought to a meeting of the manufacturers several lists containing the names of the employees who had gone on strike. Copies of the list were prepared and circulated by the defendants for the

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purpose of preventing the strikers from getting work in Haverhill and vicinity, and of forcing them to abandon the strike and return to work at the Witherell and Dobbins Company's factory against their will. The acts of the several defendants in furtherance of this combination need not be recited. The master specifically has found that Cornellier was discharged at Fox's because of this "black list." It may be said in passing that of the twenty defendants named in the bill the master finds that only the following (herein referred to as the defendants) were responsible for the acts complained of, namely, the Haverhill Shoe Manufacturers' Association, the Witherell and Dobbins Company, Gale Shoe Manufacturing Company, Charles K. Fox, Inc., Austin H. Perry, Ira J. Webster, Alwyn W. Greeley, Albert M. Child, George W. Dobbins and H. L. Webber.

Did this combination of the defendants to blacklist the striking employees of the Witherell and Dobbins Company, resulting in the discharge of and damage to the plaintiff, give him a legal cause of action? The statement of the general right of the Fox Company to terminate a workman's employment when and for what cause it chooses, where no right of contract is involved, does not carry us far. See *Coppage* v. *Kansas*, 236 U. S. 1. The same is true of the recognized equal rights of employers and employees to combine in associations or unions, so long as they employ lawful methods for the attainment of lawful purposes. See *Hoban* v. *Dempsey*, 217 Mass. 166. But it is settled that the intentional interference by even an individual, without lawful justification, with the plaintiff's right to have the benefit of his contract with his employer would be an actionable wrong. *Berry* v. *Donovan*, 188 Mass. 353. *Hanson* v. *Innis*, 211 Mass. 301. A combination to blacklist is the counter weapon to a combination to boycott, and is open to similar legal objections, when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ. See *New England Cement Gun Co.* v. *McGivern*, 218 Mass. 198, and cases cited.

It is true that in *Worthington* v. *Waring*, 157 Mass. 421, this court refused to enjoin the defendants from making use of a black list, stating that the rights alleged to be violated were personal

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and not property rights, and that there were no approved precedents in equity for issuing an injunction against the grievance there complained of. In the light of more recent decisions of the court recognizing that the right to labor and to its protection from unlawful interference is a constitutional as well as a common law right there appears to be no sound reason why it should not be adequately protected under our present broad equity powers. As intimated in *Burnham* v. *Dowd*, 217 Mass. 351, 359, the case of *Worthington* v. *Waring* cannot well be reconciled with our later decisions. It must be considered as no longer binding as an authority for the doctrine that equity will afford no injunctive relief against an unlawful combination to blacklist.

It should be added that St. 1914, c. 778, was enacted after the events in controversy and has not been considered. Nor, on the facts, have we had occasion to determine how far the "peaceful persuasion" statute (St. 1913, c. 690) permits one employer to advise another not to employ his striking employees. In several States legislation has been enacted to prevent blacklisting; and most of the decisions deal with the validity or construction of the different statutes. See Labor Laws of the United States, Bureau of Labor Statistics, Bulletin No. 148; Labor Decisions, 1912, Bulletin No. 112; *Ibid*, 1913, Bulletin No. 152.

3. The single justice ruled that "the combination of the defendant employers to aid Witherell and Dobbins in resisting the strike of their employees by refusing to employ the striking employees of the Witherell and Dobbins Company was a legal combination, and not a boycott by way of a black list." Without now considering the correctness, as abstract legal propositions, of the rulings as to the legality of a general strike to secure recognition of the union in a particular shop, and of a combination of employers as a retaliatory measure, we are of opinion that the master's report does not sustain the conclusion of fact on which apparently the rulings were based, namely, that the black list was instituted after and to resist a general strike and that the Witherell and Dobbins strike was in effect a general one. On this point the chronology of the events in the case seems decisive. The strike at Witherell and Dobbins Company's factory took place on December 12, 1912. On the following day, December 13, a meeting of the shoe manufacturers was called by the association, Mr. Dob-

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bins told them about the strike at his factory, and some of the lists of striking employees were distributed to those manufacturers who asked for them. On December 16, the plaintiff and one Cormier, whose name also was on the list, were discharged from the Fox Company's factory. The general strike of the shoe cutters in twenty-two of the sixty-five or seventy factories was not called until December 30 and was not contemplated when the original strike occurred on December 12. And as the master expressly finds, "the existence of the black list was generally known, and this undoubtedly operated as one of the elements which induced the men to give Oldham authority to call the [general] strike, and actuated them to come out after the strike had been called."

4. Assuming that, if this were an action at law, the plaintiff could recover for the damages caused by the unlawful combination of the defendants to blacklist him, the question remains whether he is entitled to prevail in the present suit. He has brought these proceedings in a court of equity. Under the established maxim that "he who comes into equity must come with clean hands," the court will not lend its active aid to him if he has been in equal wrong with the defendants touching the transaction as to which relief is sought, but will leave him to his remedy at law. The strike at the Witherell and Dobbins factory in which he joined is intimately connected with the black list of which he complains. The plaintiff individually was free, under his contract at will, to terminate his employment for any reason that he deemed sufficient. He had an undoubted right to join a labor organization. The employer as an individual had similar rights. But while each had a right to organize with others, it by no means follows that the organizations lawfully could do everything that the individual could do. See *Martell* v. *White*, 185 Mass. 255, 260; *Pickett* v. *Walsh*, 192 Mass. 572, 582. An act lawful in an individual may be the subject of civil conspiracy when done in concert, provided it is done with a direct intention to injure another, or when, although done to benefit the conspirators, its natural and necessary consequence is the prejudice of the public or the oppression of individuals. 5 R. C. L. 1093.

Without discussing the conflicting authorities in other jurisdictions, in this Commonwealth, in the present stage of the in-

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dustrial controversy, the principle is defined that the legality of a strike depends first upon the purpose for which it is maintained, and secondly on the means employed in carrying it on. As to the first, it is no longer in question that organized labor lawfully may strike for higher wages, shorter hours, and improved shop conditions. *Minasian* v. *Osborne*, 210 Mass. 250, and cases cited. On the other hand it has been decided that a strike instituted merely to compel a closed shop would not be justifiable on principles of competition, but would be unlawful. *Reynolds* v. *Davis*, 198 Mass. 294. *Folsom* v. *Lewis*, 208 Mass. 336. In the debatable ground between these extremes the conflict of rights must be adjusted as new conditions arise. And the question whether any particular strike is lawful is a question of law. *DeMinico* v. *Craig*, 207 Mass. 593. *Burnham* v. *Dowd*, 217 Mass. 351, 356.

What, then, was the purpose of the Witherell and Dobbins strike? The master has found that it was instituted and maintained for the reason that the company, although willing to grant the request for an increase of wages, was unwilling to make an agreement as to prices with or through the union or its representatives; and the employees were unwilling to make such an agreement except through the union or its representatives. Plainly it would not be unlawful for the men to combine to secure an experienced spokesman for their collective bargaining, and to select an outsider in order to avoid future criticism from the employer or fellow employees. Further, the fact that the person they select to speak for them, and to act personally as their agent in presenting the proposed price list to their employer, happens to be an official of the union would not render unlawful a strike called to enforce their demand. Apparently that is as far as the employees of the Witherell and Dobbins shop went. The master expressly finds that "The price list did not contain any provision that the union must be recognized, or make any stipulation as to the employment of union or non-union labor, and no such demand was made." Not all the men who went on strike were members of the union. Later there developed, what probably was latent from the beginning, a struggle between the manufacturers to deal with their employees as they saw fit and the union to secure recognition. As a practical matter it might be difficult to find a permanent position where the union would rest content with a degree

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of "recognition" that allowed it to represent its members without interfering with the rights of their non-union fellow workmen and virtually forcing them to join the organization. But so far as the record and the findings of the master disclose, the strike in question did not contemplate the discharge of non-union men, and was not immediately or remotely a strike for a closed shop. On the facts appearing in the record we cannot say that the combination to strike at the Witherell and Dobbins shop was for an unlawful purpose, any more than a similar combination of employers for non-recognition of the union would be.

It is clear from the findings of the master, however, that the Witherell and Dobbins strike was conducted by unlawful means; that laws were violated and the well established rights of others invaded. On several occasions crowds of strikers paraded in front of the factory, cheering and shouting "Come out," and occasionally adding the names of men who remained at work; once at least one hundred or more paraded in front of the factory, two by two in one direction and two by two in the opposite direction, so that there were four persons abreast most of the time, and the operatives leaving the factory had difficulty in breaking through the line. Some of the employees were intimidated and followed by crowds, others had to be escorted home by police officers, and four or five were assaulted by strikers or their sympathizers because they took the place of striking employees. One serious attack, characterized by the master as cowardly and unprovoked, was made on an employee named Mills, as he was going home after dark at the conclusion of his day's work. And while the persons who committed the assaults were not identified, the union and its officials made no effort to stop or control them; and the union men who were present when Mills was assaulted and rendered unconscious made no effort to give any aid or to pursue the man who struck the blow. The strike was carried on in a manner that reasonably caused the average employee to be apprehensive for his personal safety. The plaintiff cannot avoid responsibility for some, at least, of these acts. The strike, which was pending for more than three months after the bill was filed (as well as the "general" strike), was maintained under the direction of the union to which he belonged, and for the recognition of which he went on strike. He took part in the picketing and

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in at least one of the parades, and otherwise aided and encouraged it. See *Lawlor* v. *Loewe*, 235 U. S. 522.

The conduct of the plaintiff and the acts of others with whom he was legally identified preclude him from obtaining the active aid of a court of equity. For any damage caused by the black list which the defendants maintained he must seek his redress, if any, at law. Accordingly it becomes unnecessary to consider the effect upon his rights of his participation in the general strike of December 30, and the further questions, whether that strike was for a lawful or an unlawful purpose, and whether it was conducted by lawful or unlawful means.

For the reasons herein set forth a decree is to be entered overruling the exceptions, confirming the master's report, and dismissing the bill of complaint.

Decree accordingly.

DURDEN-COLEMAN LUMBER COMPANY *vs.* WILLIAM H. WOOD LUMBER COMPANY.

Suffolk. March 8, 1915. — September 15, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach. *Damages*, Special, In recoupment.

In an action of contract for the price of lumber sold and delivered the defendant claimed damages in recoupment by reason of the plaintiff's alleged failure to perform his contract in regard to the time of delivering the lumber. It appeared that the lumber was not shipped within the time agreed upon and that time was of the essence of the contract, but it also appeared that there was incorporated in the contract a provision that "all agreements are contingent upon strikes, accidents, delays of carriers and other delays beyond our control." It was found by an auditor, whose decision of facts was agreed to be final, that the delays were not occasioned by any act or omission of the plaintiff but that the delays in the various shipments were occasioned solely by carriers other than the carrier by which the final shipments by the plaintiff to the defendant were made and were due to causes beyond the control of the plaintiff. *Held*, that the plaintiff was entitled to recover the full price of the lumber delivered to and accepted by the defendant.

In an action to recover the price of lumber sold and delivered by the plaintiff to the defendant, in which special damages were claimed by the defendant in recoupment on the ground that by reason of delays in the deliveries of the ship-

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ments of the lumber a third person to whom the defendant had resold the lumber had suffered loss in consequence of the delay, where it appeared that the defendant had paid nothing to such third person on account of such alleged damages and that no action had been brought and no specific demand had been made upon the defendant for such damages, it was *said* that it was not necessary to base the denial of the defendant's right to recoupment on that ground; because it also appeared that under the express terms of the contract between the parties the plaintiff had proved an excuse for his failure to deliver the lumber within the agreed time.

CONTRACT to recover the price of certain lumber sold and delivered by the plaintiff to the defendant. Writ dated April 26, 1913.

The defendant in its amended answer claimed damages in recoupment by reason of the plaintiff's alleged failure of performance in regard to the time of delivering the lumber.

In the Superior Court the case was referred to John J. Higgins, Esquire, as auditor, "to hear the parties, to examine their vouchers and evidence, to state the accounts, and make report thereof to the court; his findings as to facts to be final, and his report to be filed within fourteen days." The auditor filed a report, in which he found the facts that are stated in the opinion. Later the case was heard by *Jenney*, J., without a jury, upon the auditor's report and the plaintiff's motion for the entry of judgment thereon. The defendant asked the judge to make the following rulings:

"6. The defendant is entitled to damage by reason of the failure of the plaintiff to perform its contracts or one of them.

"7. The defendant is entitled to recover as special damage such sum as shall be considered sufficient to meet all future claims which may be made against it by reason of its resale of the merchandise purchased from the plaintiff to its customer [which was] in contemplation of the parties at the time the contract was made.

"8. The natural consequences of delay and stoppage of work and payment of wages and expenses arising therefrom and the loss from not having the work finished at the time it otherwise would have been, are the proper subjects for the recovery of damages.

"9. The defendant has sustained the burden on it to show that it is entitled to recover damages from the plaintiff.

"10. The words 'delays of carriers' in the contract mean delays of the Ocean Steamship Company, which was the carrier

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which brought the lumber from the place of shipment, as set forth in the contracts, to the consignee, the defendant."

The judge refused to make any of these rulings, and ordered that judgment should be entered for the plaintiff according to the findings contained in the auditor's report. The defendant alleged exceptions.

J. E. Eaton & E. T. McKnight, for the defendant, submitted a brief.

W. S. McCallum & G. K. Bartlett, for the plaintiff.

DE COURCY, J. Under the rule issued to the auditor in this case his findings as to the facts are final. It is settled by the report that the lumber was not shipped within the period agreed upon, and that time was of the essence of the contract. The defendant's orders, however, were accepted on the express stipulation that "all agreements are contingent upon strikes, accidents, delays of carriers and other delays beyond our control," and this provision became embodied in the contract between the parties.

On the facts as found the delay was not occasioned by any act or omission of the plaintiff. The Durden-Coleman Lumber Company, in order to expedite deliveries, divided the defendant's orders among ten mills and used every effort to perform the contract in accordance with its terms. It appears that stormy weather rendered it impossible promptly to team the logs from the woods to some of the mills, and from other mills to the cars, and that there was delay in getting cars from the railroad companies to carry the lumber from the mills to the steamboat wharf at Savannah. But the auditor finds that the delays in the various shipments were occasioned solely by other carriers than the Ocean Steamship Company, and were due to causes beyond the control of the plaintiff. This makes out an excuse for the failure of the plaintiff to deliver the lumber within the agreed time. All of it, with the exception of twenty-one pieces for which allowance was made, was accepted by the defendant and was used by its vendee. The plaintiff is entitled to recover the amount found due by the auditor with interest from January 8, 1913, the date of demand for payment.

In view of the findings of fact the judge rightly refused to give the defendant's requests. Those numbered 7 and 8 relate to special damages, based on the claim that the Fred S. and A. D.

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Gore Corporation — to whom the defendant resold the lumber — suffered loss on account of the delays in shipment. Aside from the fact that the defendant has paid nothing to the Gore Corporation on account of such alleged damage, and that no action has been brought nor specific demand made upon it therefor (see *Graham* v. *Middleby*, 213 Mass. 437, 443), plainly such a claim must fall to the ground with the defendant's demand for general damages.

Exceptions overruled.

AMERICAN TOY MANUFACTURING COMPANY *vs.* JAMES G. McLOUGHLIN & another.

Suffolk. March 10, 1915. — September 15, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach. *Damages*, Recoupment.

In an action for the breach of a contract in writing by the defendant's failure to accept twenty-five thousand toy cannon manufactured and sold by the plaintiff to the defendant under an exclusive license to the plaintiff from the patentee of the toy, it appeared that a third person without right had placed a similar toy cannon on the market, and the defendant, alleging that he was injured by this competition, based his refusal to accept the toys and a claim in recoupment on the ground that the plaintiff had failed to protect the defendant from the infringement of the patent by the third person. It appeared that the contract was made by letter and contained no agreement of the plaintiff to guarantee the defendant against an infringement of the patent, but that the plaintiff merely agreed to sell the toy cannon to the defendant exclusively during the period of the contract; and certain oral evidence offered by the defendant, even if it had been admissible, failed to show any such agreement of guaranty. The excluded evidence, together with that which was admitted, did not show that there was in fact an infringement of the patent nor did it show any failure of the plaintiff to do what he ought to have done to restrain an infringement. *Held*, that there was no defence to the plaintiff's action for breach of contract and that no basis had been shown for any recoupment of damages.

CONTRACT for loss and damage to the plaintiff caused by the defendants' refusal to accept and pay for twenty-five thousand toy cannon according to a contract between the parties made on or about February 8, 1906. Writ dated December 18, 1908.

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The defendants, in addition to an answer containing a general denial, filed what they called a declaration in set-off, claiming loss and damage alleged to have been suffered by them upon twenty-five thousand toy cannon previously purchased and paid for by them under the contract by reason of the plaintiff's (the defendant's in set-off) failure to furnish the exclusive sale of the toy cannon and permitting or failing to prevent other parties from interfering with sales of the toy cannon by the defendants (the plaintiffs in set-off).

In the Superior Court the case was tried before *Hitchcock*, J. The contract shown by the letters of the parties is stated in the opinion. The judge excluded certain evidence offered by the defendants as described in the opinion. No exception was taken to the judge's charge. The jury returned a verdict for the plaintiff in the sum of $500 and also found for the plaintiff upon the defendants' declaration in set-off. The defendants alleged exceptions.

E. C. Stone, for the defendants.

A. W. Putnam, for the plaintiff.

De Courcy, J. Under the contract between the parties, the twenty-five thousand toy cannon delivered in 1906 were paid for by the defendants; but they refused to accept any of those which were to have been delivered in 1907. The cannon had been patented in the United States by one Tuttle, and he had granted to the plaintiff an exclusive license to market and sell the toy. It appears that a third person, the Milton Bradley Company, without legal right, placed a similar toy cannon on the market in 1906. The defendants, claiming to be injured by this competition, based their refusal to pay, and their claim in recoupment, upon the ground that the plaintiff failed to protect them from such infringement of the patent by others.

To this contention of the defendants a conclusive answer is that the plaintiff made no such agreement. What the plaintiff did agree was that it would not sell this cannon to any other party for two years. Thus in its letter of February 2, 1906, it wrote: "Providing you desire to do so we would agree for a period of a year or two to sell this style gun to you alone outside of our marketing some ourselves in our own games, if you could place orders with us which would warrant our doing so." In its letter of Feb-

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ruary 6, it said: "We guarantee in return to sell this small gun to you exclusively as a Game Publisher for period of time specified." The defendants, in their letter of February 8, accepted this offer and added some particulars as to payment, which apparently completed all the details of the contract. The subsequent conduct of the defendants confirms the view that they regarded the letters as embodying the entire contract, and as guaranteeing only that the plaintiff would sell the cannon to them exclusively. And there is no evidence that it failed to carry out this promise.

The exceptions relate mainly to the exclusion of certain oral evidence which the defendants sought to introduce. Plainly it was not admissible on the first ground now argued, namely, that in the correspondence reference was made to some conversations between the representatives of the parties which would explain or amplify the contract in writing. The only instances relied on are the words in the defendants' letter of January 27: "Taking up the matter of the rapid fire cannon, about which your representative called the other day," and those in the letter of May 22: "Also in the absence of Mr. James McLoughlin who negotiated with you we are unable to say whether the goods conform to the sample discussed with him." These references relate to the identity of the cannon and clearly not to any alleged guarantee against infringement, on which the defendants' claim rests.

The defendants further argue that the evidence offered was of a collateral, oral understanding, to wit, an agreement to protect or guarantee the defendants against infringement by other parties of the patent rights under which the toy cannon were manufactured. The record however discloses no offer made to show any such agreement. All that the defendants asserted at the trial was that they were to be protected from competition under "rights granted under this patent," and not from "competition by something that was an infringement on this patent." As counsel said, in assenting to a statement of the presiding judge: "I am not going to try out the question of infringement, of course." Apparently it was assumed that the question of infringement involved a "case" arising under the patent-right laws of the United States, and within the exclusive jurisdiction of the Federal courts. See U. S. Rev. Sts. § 711; 4 Fed. Sts. Ann. 494; *Henry* v. *A. B.*

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Dick Co. 224 U. S. 1, 14, 15. And even if such an agreement to protect against infringement had been shown, the offer of proof further failed to show that the plaintiff omitted to do anything which it ought to have done. It appears that the plaintiff not only sold none of the cannon to the Milton Bradley Company, but that when informed that this company apparently was infringing the Tuttle patent it promptly consulted its attorneys on the subject. The defendants did not offer to show what more it could have done. As the plaintiff was only a licensee of the patent it could not bring a suit in its own name, either at law or in equity, for the infringement. 30 Cyc. 1000, and cases cited.

With the issue of infringement eliminated, the offer of proof at the most was to show an agreement to give to the defendants the exclusive sale of these toy cannon in their games. This would add nothing to the contract set forth in the letters, even if we regard the letters as not containing the complete and final record of all the terms agreed upon.

There are additional grounds for overruling some of the exceptions, but it follows from what has been said that the excluded evidence, together with that which was admitted, was insufficient to show that there was in fact an infringement, or a failure by the plaintiff to do what it ought to restrain one, or a breach of any of the provisions of its contract. In short, the evidence offered did not go far enough to afford a defence to the plaintiff's claims or a basis for the claim in recoupment, called a declaration in set-off, filed by the defendants; and accordingly no error is shown in the exclusion.

Exceptions overruled.

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AUGUSTUS P. LORING & another, executors, *vs.* GEORGE A. GARDNER & others, trustees.

Norfolk. June 21, 1915. — September 15, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Devise and Legacy. Power, Execution of. *Words,* "Legacies."

A testator by a clause of his will exercised a power of appointment, given to him by the will of his mother, to dispose of a fund of which he received the income during his life, which power was limited by the terms of his mother's will to appointments to one or more of the issue of her father and mother. By a later clause of his will the testator provided as follows: "I wish all the legacies hereinbefore given to be paid in full to the various legatees without deduction for legacy taxes and succession dues, which taxes or dues shall be charged to the residue of my estate." By the language used in the other portions of his will the testator showed that he recognized a distinction between a legacy and an appointment under a power and it reasonably might be concluded that he did not regard an appointment as a legacy. *Held,* that the word "legacies" as used in the clause quoted above was not intended to include appointments, and that the succession taxes payable to the Commonwealth on the transfers made under the appointment exercising the special and limited power given to the testator by the will of his mother were payable out of the fund appointed and not out of the residue of the estate of the testator.

APPEAL from a decree of the Probate Court for the county of Norfolk made upon a bill for instructions filed by the executors of the will of Francis Skinner, late of Dedham, and instructing such executors that the inheritance taxes due to the Commonwealth on account of the transfer of the fund appointed by the testator in the eleventh clause of his will were not payable out of the residue of his estate but should be paid out of the fund so appointed.

The case came on to be heard before *Crosby,* J., who at the request of the parties reserved it for determination by the full court.

The case was submitted on briefs.

F. R. Boyd, for the defendants George A. and George P. Gardner.

J. B. Warner, H. E. Warner & P. L. Stackpole, for the residuary trustees under the will of Francis Skinner.

DE COURCY, J. Francis Skinner, by the eleventh clause in his

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will, exercised a power of appointment which was limited by the terms of the will of the donor, Eliza B. Skinner, who was the mother of the donee of the power, to one or more of the issue of her father and mother. The executors under his will have asked instructions as to whether the inheritance taxes due to the Commonwealth on account of the transfer of this fund shall be paid by them out of the residue of his estate or shall be paid out of the fund itself, — which is now held by the trustees under the will of the donor.

The trustees under the will of the donor Eliza B. Skinner admit that under the general inheritance tax law this tax ordinarily would be payable out of the trust fund itself. See St. 1909, c. 490, Part IV, § 9; and § 1, as amended by St. 1912, c. 678, § 1; *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. They contend, however, that the testator Francis placed the burden of the tax on the residuary of his estate by the thirteenth clause of his will, which reads as follows: "I wish all the legacies hereinbefore given to be paid in full to the various legatees without deduction for legacy taxes and succession dues, which taxes or dues shall be charged to the residue of my estate."

In ascertaining the testator's intention as to the scope of the word "legacies" in this clause, it is important to consider the nature of the power by the exercise of which this fund passed. The donee, Francis, did not have a right to appoint to whomsoever he pleased. He had no such absolute control of the fund as he had of the property owned by himself. It is physically, as it has been, in the hands of the trustees under the will of his mother, and not in the hands of the executors of his will. He had only a life interest in this fund; and as the donee of the power he was restricted to appointing the property to the beneficiaries designated in the instrument creating the power, namely, the issue of the father and mother of the donor Eliza B. Skinner. In short, it was not a general power of appointment but only a special and limited one. Its exercise would not be accurately described as a "legacy."

That the testator did not regard the exercise of the power over this property as a legacy, but rather intended to limit that word to the disposition of the property of which he had absolute ownership and control, seems indicated with reasonable certainty by

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the language he used in other parts of the will. In the preamble he states that the will covers "all the property of which I may die seized or possessed, or over which I may have any power, or to which I may be in any way entitled at the time of my decease;" showing that he had in mind the distinction between the property which he owned and could transfer to whomsoever he chose, and that over which he had only a power of appointment. When he comes to the disposition of it, he uses words appropriate for a legacy, "I give," or "I give and bequeath," in every gift clause of his will; while in the eleventh and twelfth clauses, where he deals with the power given him by the donor, he makes use of the words "I appoint" and "I appoint and dispose of." It is reasonable to conclude from the language discriminatingly applied by him that he did not consider an appointment as a legacy. Consequently if he had intended to shift the burden of the tax in question from the trust fund, which ordinarily would bear it, to the residue of his estate, as he expressly did in the case of legacies, one would expect him to use appropriate language in the thirteenth clause to manifest that intention. As the practical effect of transferring the fund free of tax would be to increase the fund, such intent must appear clearly. See Dos Passos on Inheritance Tax Law, § 64; *Sherman* v. *Moore*, 89 Conn. 190.

The case of *Isham* v. *New York Association for the Poor*, 177 N. Y. 218, relied on by the defendants, is plainly distinguishable. There the power was a general one and the court said: "The effect of conferring a general power of appointment is to invest its donee with a power of disposition as broad as though she was disposing of her own property. In the exercise she, in fact, makes a gift, or bequest, to persons of her own selection." Further, the testatrix used the words "I give and bequeath," and it was held that she evidently supposed that she had made a gift or legacy in exercising the power.

The case at bar is somewhat close, but as a question of interpretation we are of opinion that the testator did not intend to include in the word "legacies," in the thirteenth clause of his will, the property passing under the special power of appointment. Accordingly the decree of the Probate Court should be affirmed; and it is

So ordered.

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GEORGE L. CLARKE & another, trustees, *vs.* MARY B. RATHBONE & others.

Suffolk. March 8, 9, 1915. — September 16, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Devise and Legacy.

A testator provided that, upon the death of his last surviving child, a trust fund established by his will should be distributed "to such of my grandchildren as shall then be living in equal shares." He also provided in regard to one of his grandchildren, whom he had adopted as a child, after reciting the fact of his adoption, as follows: "Now be it known that it was not, nor is it my intention thereby to have the said [naming the grandchild thus adopted as a child] share in my estate as one of my children, but that he should take under my Will only the share of a grandchild." The grandchild thus referred to died before the termination of the trust leaving a son, and later, upon the death of the testator's last surviving child, this great-grandchild claimed the share of a grandchild under the provision first above quoted on the ground that he was a grandchild because of the adoption of his father and that the above provision as to treating his father as a grandchild did not affect his rights. *Held*, that the testator intended that for the purposes of taking property under his will the adoption should be disregarded, and that the great-grandchild claiming to be a grandchild by reason of such adoption should be excluded from the distribution.

A testator made the following provision in regard to the distribution of the income of a trust fund established by his will: "To pay all the remainder of said income . . . in equal shares to my several children . . . [naming them] for, and during the period of the natural life of each of my said children. And upon the decease of any of my said children, the share, or shares of said deceased child, or children, not withstanding such deceased child or children shall leave issue surviving, until after the decease of all my said children, when I direct:" Here followed a direction to distribute the trust fund among his grandchildren then living. *Held*, that, there being nothing to indicate what words had been omitted, the missing words in the incomplete sentence could not be supplied by conjecture, but that the words as they stood showed that the income was given to the children named as a class, and that upon the death of one of them the income was to be paid to the survivors until, upon the death of all but one, the whole income was to be paid to the last survivor until his or her death.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 30, 1914, by the trustees under the will of Alfred L. Baury, late of Newton, who died in the year 1865, for instructions as to the duties of the plaintiffs in the distribution of the principal and accumulated income of the trust fund upon the death of Elizabeth

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P. Baury, the last surviving child of the testator, who died on August 30, 1914.

The fourth article of the will provided that the trustees upon the death of all the testator's children "shall distribute such trust property remaining in their hands, to such of my grandchildren as shall then be living in equal shares; so that none shall take by representation, but all per capita."

Later in the same article of the will was the following provision: "And having adopted one of my grandchildren Louis. Paul, Otis, son of Doctor George A. Otis, and my deceased daughter, Pauline, wife of said George A. Otis, as my own child, and having had the name of said Louis Paul. Otis, changed to that of Alfred Louis. Baury, by an act done before the court of Probate for the district of Suffolk, dated the twenty first day of March A.D. 1864, Now be it known that it was not, nor is it my intention thereby to have the said Alfred Louis Baury share in my estate as one of my children, but that he should take under my Will only the share of a grandchild."

Louis Paul Otis, whose name, as recited in the will, was changed to Alfred Louis Baury on March 21, 1864, was born on July 10, 1863, and died in the year 1913 during the lifetime of Elizabeth P. Baury. He left a will by which he gave all his property to his widow, Mary C. Baury, who was appointed executrix of his will and was one of the defendants. He left a son, the defendant Alfred L. Baury, whose contention is stated in the opinion.

The portion of the will whose interpretation was sought in relation to the distribution of accumulated income, which also was contained in the fourth article, was as follows:

"To pay all the remainder of said income, rents, or profits of my estate, both real and personal, whatever the same may be from time to time from the extinguishment of charges, or the expiration of annuities, in equal shares to my several children, as nearly quarterly as may be convenient; that is to say, To Mrs. Catherine Henshaw Jackson, wife of Doct Samuel Jackson, U.S.N. Elizabeth Platt Baury, Mrs. Caroline, Hayward Bradford, wife of Capt Robert F. Bradford, U.S.N. and Frederic Francis Baury U.S.N. for, and during the period of the natural life of each of my said children. And upon the decease of any of my said children, the share, or shares of said deceased child, or children, not

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withstanding such deceased child or children shall leave issue surviving, until after the decease of all my said children, when I direct."

The case was heard by *Pierce*, J., who at the request of the parties reserved and reported it on the pleadings and the facts which had been agreed by the counsel of the parties in open court for determination by the full court.

F. Brewster, for the plaintiffs, stated the case.

F. Rackemann, for the defendant Mary B. Rathbone and others.

H. E. Warner, for the defendant Alfred L. Baury.

H. M. Davis, for the administrator of the estate of Elizabeth P. Baury.

C. H. Sprague, for the defendant Mary C. Baury, submitted a brief.

E. F. Fish, for the defendant Rollin H. Allen, submitted a brief.

LORING, J. 1. We are of opinion that by the true construction of the "Fourth" article of the will of the testator the principal of the trust fund is now to be distributed among the grandchildren living at the date of the death of Elizabeth P. Baury, the survivor of his children.

The defendant Alfred L. Baury, who is a child of a grandchild, contends that through the testator's adoption of his father he (this defendant) became a grandchild of the testator and that in this way he is entitled to a share in the distribution of the trust fund.

But after referring to the adoption of this defendant's father, the testator made this provision: "Now be it known that it was not, nor is it my intention thereby to have the said Alfred Louis Baury share in my estate as one of my children, but that he should take under my will only the share of a grandchild." In our opinion that clause is decisive against the contention now made by this defendant, and it makes it unnecessary to consider what would have been the result had not that clause been inserted in the will.

The contention of this defendant (the great-grandchild) to the contrary is based on the contention that this clause defines the *status* of the adopted child (his father) and states the property which the adopted child (who was naturally a grandchild) was to receive under the will of the testator. But that neither in

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terms nor in substance does it undertake to deal with the *status* of a child of the adopted child of the testator. The argument is that if that had been the intention of the testator he would not have changed the form of expression used in the first sentence (it is not my intention to have "Alfred Louis Baury share in my estate as one of my children") to that used in the second sentence ("but that he should take under my will only the share of a grandchild"). The contention is that, if the testator had meant to provide that the *status* of his father (who was in fact the grandchild of the testator and by adoption his child) should remain that of grandchild for all purposes he would have cast the second sentence in the same form as that in which he cast the first sentence and would have provided "that he should take under my will as a grandchild only." We are of opinion, however, that this argument calls for too nice a use of words to be adopted as the true rule of construing the will of this testator. It is apparent, in our opinion, that by this clause the testator intended that for the purposes of taking property under his will the adoption should not make a difference.

If the construction contended for by this defendant were correct, the father of this defendant (the adopted child) and the defendant himself (his child and so a grandchild of the testator) would both have taken a share as grandchildren if both had been living when the time came for the distribution of the *corpus* of the trust estate; the adopted son because he was in fact a grandchild, the defendant because by the adoption of his father he had become a grandchild and because this clause did not exclude him. We cannot believe that this result was what the testator intended in that event.

2. The other question presented concerns the income which accrued during the life of the last surviving child of the testator. The clause of the will which deals with the income of the trust fund is manifestly an incomplete sentence. No effect can be given to it except on the assumption that some words have been omitted and by supplying the missing words. But there is nothing from which it could be determined what the missing words to be supplied are, if there are missing words to be supplied.

The administrator of the estate of the last survivor of the life tenants contends that if the period between the words "children"

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and "And" is omitted and the fact that the word "And" begins with a capital is disregarded, the sentence becomes complete. But we are not able to reach that conclusion in case the period is omitted and the fact that "And" begins with a capital is disregarded. In that case the gift of the income is in these words: "To pay all the remainder of said income . . . in equal shares to my several children . . . [naming them] for, and during the period of the natural life of each of my said children and upon the decease of any of my said children, the share, or shares of said deceased child, or children, notwithstanding such deceased child or children shall leave issue surviving, until after the decease of all my said children." The sentence is still an incomplete one. In arguing that it is not, the learned counsel really asks us to supply the words "shall be paid in like manner to the (other) children," and to insert the words thus supplied between the words "deceased child or children" and "notwithstanding." There is nothing in the will which makes it certain that these are the words which were omitted. Under these circumstances they cannot be supplied. *Metcalf* v. *Framingham Parish*, 128 Mass. 370. *King* v. *Viscoloid Co.* 219 Mass. 420.

Although this incomplete sentence does not provide for the disposition of the income after the death of one or more of the life tenants, it does make plain that the distribution of the principal is not to take place "until after the decease of all my said children." The clause from which there are missing words must be disregarded. Item 3 of article "Fourth" is there as follows: "To pay all the remainder of said income . . . in equal shares to my several children . . . for, and during the period of the natural life of each of my said children . . . until after the decease of all my said children, when I direct" that the *corpus* be distributed among my grandchildren then living, *per capita.*

We are of opinion that by the true construction of this item of the "Fourth" article the income was given to the children named as a class, and that upon the death of one the income was to be paid to the survivors, and upon the death of all but one it went to the last survivor. The provisions of item 3 are very like the provisions of the will in *Meserve* v. *Haak*, 191 Mass. 220. What was said in the opinion in that case is applicable here. See also *Loring* v. *Coolidge*, 99 Mass. 191; *Wheaton* v. *Batcheller*, 211 Mass. 223.

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It is certain that there is no intestacy. See *Brown* v. *Wright*, 168 Mass. 506.

The result is that the plaintiffs should be instructed to distribute the principal of the trust fund among the ten defendants, Mary B. Rathbone, Katherine H. Muller, Katherine B. Treadwell, Robert F. Bradford, Pauline B. Bradford, Caroline B. Jansen, Sarah B. Richardson, Agnes P. O. Smedes, Nancy Otis Winston and Baury de B. Bradford, or their assignees so far as they have made assignments of their interests; and that the income which accrued after the death of the other children and before the death of the last surviving child of the testator (Elizabeth P. Baury), should be paid to George L. Clarke, as administrator of her estate.

Decree accordingly.

ABRAHAM J. EPSTEIN *vs.* WILLIAM H. DUNBAR & others.

Suffolk. March 10, 1915. — September 16, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CARROLL, JJ.

Landlord and Tenant. Estoppel. Equity Jurisdiction, To enjoin partial eviction of tenant, Damages.

Where the owner of a building, after giving to a tenant a lease of one of the floors of the building, closes an entrance of the building on a business street which existed when he gave the lease and substitutes another entrance equally convenient to the lessee through a building which the lessor does not own, and later the lease is "renewed and extended" by an instrument which incorporates by reference the description of the demised premises contained in the first lease as bearing the street number of the removed entrance, and after such renewal the lessor continues to treat the substituted entrance as bearing the number of the removed one, and where the owner of the substituted entrance, rightfully having control of it, closes its connection with the tenant's premises, so as to shut him off from all access to the street on which the removed and the substituted entrances opened, in a suit in equity by the lessee against his lessor to enjoin him from evicting the plaintiff from the use of the substituted entrance and for damages, the defendant is estopped to deny the existence of the substituted entrance as a part of the demised premises and as against the plaintiff cannot show title in another to relieve himself from liability.

In the case stated above the defendant, not having in fact the title to such substituted entrance, cannot be required to reopen the entrance which he does not control, and must respond in damages.

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In the same case it was *held*, that the partial eviction did not necessarily terminate the lease, so that it was not essential that the tenant should abandon the entire premises before seeking relief in equity.

BILL IN EQUITY, filed in the Superior Court on December 29, 1913, against the defendants Dunbar and Hammond as the owners, as trustees, of a building on the corner of Essex Street and Harrison Avenue in Boston, and as the lessors to the plaintiff of all the second floor of that building, and against the defendant Wirth as the lessee of the whole of the adjoining building numbered 37 on Essex Street, praying that the defendants Dunbar and Hammond might be ordered to restore the stairway which formerly connected the plaintiff's premises with the entrance numbered 41 on Essex Street and to reopen that entrance to the building, and that, until such stairway should be restored and such door reopened, the said defendants should keep open a door in the partition wall of the building and maintain a stairway therefrom connecting with the entrance to the adjoining building numbered 37 Essex Street.

The case was heard by *Pierce*, J. (on March 4, 1914). He found the facts that are stated in the opinion, and made a decree ordering that (1) as to the defendant Wirth the bill was to be dismissed with costs; that (2) the plaintiff was not entitled to have restored the stairway which formerly connected the premises with the doorway numbered 41 Essex Street; that (3) the plaintiff was not entitled to have reopened the door in the partition wall referred to in the plaintiff's bill; that (4) the destruction of the doorway referred to in the preceding paragraph was a partial eviction of the plaintiff as well as a violation of the implied covenant for quiet enjoyment; that (5) upon the plaintiff's furnishing the defendants Dunbar and Hammond with a bond in the penal sum of $2,000, with sufficient sureties conditioned upon payment to the said Dunbar and Hammond within thirty days after the entry of the final decree herein of the net amount of all rent and other moneys that might then be due from the plaintiff under the leases or because of the occupancy by the plaintiff of the whole or any part of the premises described in the leases, and interest thereon, the defendants Dunbar and Hammond be enjoined from ejecting the plaintiff from the premises now held by him under leases from the defendants Dunbar and Hammond

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dated October 30, 1912, and March 21, 1911; and that (6) the bill was to be retained for the assessment of damages, such damages to be determined upon the theory that the destruction of the doorway referred to in the paragraph numbered (3) was a partial eviction and a violation of implied covenants in the leases dated October 30, 1912, and March 21, 1911, for quiet enjoyment.

The defendants Dunbar and Hammond appealed from the decree, the evidence having been reported by a commissioner appointed under Equity Rule 35.

J. B. Studley, for the defendants.

J. E. Hannigan, for the plaintiff.

RUGG, C. J. On April 16, 1908, the plaintiff as lessee and the defendants Dunbar and Hammond as lessors executed a lease for the term of three years of "all the second floor of the building at the corner of Essex Street and Harrison Avenue in the city of Boston, numbered 41 Essex Street, except the room now occupied by M. Wade." At that time the main entrance to the demised premises was numbered 41 on Essex Street, although there was a rear entrance on Harrison Avenue, narrow and inferior compared with the other, used chiefly but not exclusively for the receipt and delivery of merchandise. The building which bore the number 37 on Essex Street belonged to different legal and equitable owners from that numbered 41, although certain of the legal owners were the same, and the defendant Dunbar, an owner in each estate, apparently had full charge of both estates. In December, 1908, the lessors of the plaintiff, conceiving that the space occupied by the doorway and stairs at number 41 Essex Street was too valuable to be used longer for that purpose, removed the stairs and door and by opening a doorway in a partition wall connected the plaintiff's premises with a different stair and doorway opening at number 37 Essex Street. Thus the plaintiff was deprived of the means of ingress and egress existing at the time of the execution of the lease, and another more convenient and attractive was afforded, which was not over land owned exclusively by his lessors. While nothing was said about any use of the new way, it was the purpose of his lessors to lead the plaintiff as lessee to believe that it was for his use in substitution for the old, and he silently accepted the tacit proposal of his lessors that, if he would permit the destruction of the old way, he should

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have the new one in place of it. Thereafter, so far as concerned the lessors and the lessee, the new entrance was treated as number 41 Essex Street. On March 21, 1911, the plaintiff and his lessors signed and sealed an instrument which provided that "The lease dated April 16, 1908, . . . of premises in the building at the corner of Essex Street and Harrison Avenue in the city of Boston, Massachusetts, is hereby renewed and extended from the expiration thereof on April 30, 1911, for a further term of five (5) years." On October 30, 1912, the defendants Dunbar and Hammond demised to the plaintiff by lease to expire May 1, 1916, "the balance of the second floor of the building at the corner of Essex Street and Harrison Avenue, in the City of Boston numbered 41 Essex Street, not now occupied by him under existing lease dated April 16, 1908, and extended March 21, 1911 (being the room lately occupied by M. Wade)." The plaintiff occupied the premises for the carrying on of his business as a wholesale dealer in woolen goods. The plaintiff's lessors, after removing the stairs and the door number 41 Essex Street, leased the space to the defendant Wirth, who also is the lessee of the entire building number 37 Essex Street. Wirth, in accordance with his right as lessee and after permission from the defendant Dunbar, has closed the door which in December, 1908, the defendants Dunbar and Hammond opened in the partition so as to give access to the plaintiff's premises from number 37 Essex Street, and the plaintiff thus is deprived of all means of entrance from Essex Street.

A decree was entered in the Superior Court dismissing the bill with costs as to the defendant Wirth and in effect dismissing so much of it as seeks to have the entrance at number 41 Essex Street restored and the doorway in the partition wall reopened upon the plaintiff's giving bond to pay arrears of rent, but enjoining the lessors from evicting him and retaining the bill for the assessment of damages. No appeal has been taken from the finding in favor of the defendant Wirth, and therefore he is exonerated from liability to the plaintiff.

This narration of the material facts as found by the Superior Court shows that the lessors have so conducted themselves with reference to a reasonable means of access to the demised premises from Essex Street as to be estopped from denying its existence.

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When the original lease was executed, there was the entrance at number 41 Essex Street. Later and during the term of the first lease and for their own profit they closed this entrance but substituted another quite as convenient to the lessee. They then "renewed and extended" the lease by an instrument which incorporated by reference without variation the description of the demised premises contained in the first lease as being "numbered 41 Essex Street," the use in fact continuing the same by the entrance then numbered 37 on Essex Street. Continuously they refer to the premises as on Essex Street and they direct mail to the lessee at Essex Street. While of course the rights of strangers cannot be affected by estoppel, the conduct of the lessors has been such that they cannot now deny as against the plaintiff that there is reasonable access to his premises from Essex Street. When the first lease was given there was access from number 41 Essex Street. The circumstances under which that entrance to the demised premises was destroyed and that at number 37 was opened were such as to warrant the court in finding, if, indeed, they did not require a finding, that the new was substituted for the old entrance. *Smith* v. *Barnes*, 101 Mass. 275. The execution by the lessors of the new lease with precisely the same description of the demised premises as the old, and without giving the slightest intimation that there was any change in the property, renders it inequitable that they should assert now that there is a change. Their conduct brings them within the elementary limits of the doctrine of estoppel. They maintained silence, but by fair interpretation their instrument and their conduct said to the plaintiff as a reasonable man that the thing about which the contract was made, namely, the demised premises with all its appurtenances including its Essex Street entrance, was unchanged. Although there was no express representation by spoken words, all the antecedent and contemporaneous circumstances and the demeanor of the lessors up to that moment were equivalent to an assertion that the substituted entrance at number 37 Essex Street was a part of the demised premises. There is ample ground to support the conclusion that the plaintiff was led to believe by the lessors' conduct that the situation remained the same so far as concerned his right of access. An obligation in good faith rested on the lessors to speak if the

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premises which they were leasing again to the plaintiff by identical description were not the same as those described in the first lease. There were no notorious public facts or other matters indicating a difference in the demised premises, of which it might be assumed that the tenant had notice. In the light of all these attendant factors it is of no consequence whether the lessors have title to the substituted entrance or not. As against the plaintiff they cannot show title in another to relieve themselves from liability. But, as they have not the title, they cannot be required to reopen the entrance and must respond in damages.

Whether the description in the lease by construction might be held to mean a reference to the stairway actually used in connection with the premises need not be considered. See *Cowen* v. *Truefitt, Ltd.* [1899] 2 Ch. 309. However that may be, the conditions are such as to estop the lessors from setting up the title to the Essex Street means of access in another.

The lessors rely upon *Howe* v. *Alger*, 4 Allen, 206, *Cole* v. *Hadley*, 162 Mass. 579, and like cases where it is held that in a deed a description of granted premises as bounding upon a street is not a grant of a right of way in the street when the grantor owns no right in such street. Those cases are distinguishable. In the case at bar the relations and conduct of the parties for a considerable period of time constituted a construction of the lease which prevents the lessors from asserting now a different construction.

The facts show a partial eviction. *McCall* v. *New York Life Ins. Co.* 201 Mass. 223. *Nesson* v. *Adams*, 212 Mass. 429. *Boston Veterinary Hospital* v. *Kiley*, 219 Mass. 533. The premises are no longer suitable for the purpose for which they were hired. *Raynes* v. *Stevens*, 219 Mass. 556, is unlike the case at bar. But the lease was not thereby necessarily determined and it is not essential that the tenant should abandon the entire premises before seeking relief in equity. *Smith* v. *McEnany*, 170 Mass. 26. *Leishman* v. *White*, 1 Allen, 489. *Colburn* v. *Morrill*, 117 Mass. 262.

Decree affirmed with costs.

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WALTER G. WEHRLE, assignee in insolvency, *vs.* MERCANTILE NATIONAL BANK OF SALEM & others.

Essex. March 10, 11, 1915. — September 16, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Pledge. Equity Jurisdiction, Laches.

The ordinary relation of pledgor and pledgee, although sometimes spoken of as in the nature of a trust, is not a fiduciary one as affecting the period of limitation of actions at law or the time within which a suit in equity must be brought.

Where the right of a pledgor to demand and receive certain shares of stock pledged to secure the payment of certain notes given by the pledgor for the accommodation of the pledgor's son was asserted for the first time in a suit in equity brought twenty-eight years after the notes had been paid, and there was nothing to indicate any deception or concealment on the part of the pledgee, it was *held*, that the suit was barred by laches.

In the suit above described the facts, that after the notes had been paid the assignee in insolvency of the estate of the pledgor had died and that no successor was appointed until the plaintiff was appointed such successor twenty-two years after the death of the original assignee, were *held* to have had no effect to suspend the operation of the lapse of time.

RUGG, C. J. This case comes before us on appeal from a decree * dismissing the bill after an order sustaining a demurrer. The material averments are that in 1878, Rebekah K. Jacobs indorsed and delivered to the firm of James O. Safford and Company twenty-six shares of stock of the defendant bank as collateral security for notes made by her for the accommodation of her son. The stock subsequently was transferred to the name of the firm and has been held by them. In 1881, one Choate was appointed assignee of the estate of Mrs. Jacobs, who had been adjudged insolvent. In 1884, Safford and Company executed and delivered a full release of all claims against the son, and a year later the surviving partner acknowledged full settlement of all claims against Mrs. Jacobs in the insolvency proceedings against her, and that the indebtedness as security for which the stock had been transferred was paid in full in 1884 or 1885. Choate, the assignee in insolvency of the estate of Mrs. Jacobs, died in 1890 and there was no assignee of her estate until the plaintiff was appointed in his stead in 1912. This suit in equity is brought to recover the

* Made by *Jenney*, J.

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twenty-six shares of bank stock and the dividends which have accrued thereon. The bill was filed in March, 1913, twenty-eight years after it is averred that the debt for which the stock was deposited as collateral was paid.

The parties defendant are the bank whose shares of stock are sought to be recovered, the surviving partner of Safford and Company, who has deceased since the bringing of the suit and whose administrators defend, and the administrator of the estate of the other partner. The demurrer sets up the statute of limitations, laches, and staleness of the plaintiff's demand.

It is not necessary to determine whether the right of action of a pledgor to recover the pledge accrues without demand and at once upon the satisfaction of the claim to secure which the pledge was deposited. See *Hancock* v. *Franklin Ins. Co.* 114 Mass. 155, 156, and *Currier* v. *Studley*, 159 Mass. 17. If it be assumed in favor of the plaintiff, without so deciding, that a demand sometimes may be necessary, the delay in making the demand and in bringing the action in the case at bar is so great that he cannot prevail. The right to make the demand, if one was necessary, came into existence at latest in 1885. The subsequent death of the assignee of Mrs. Jacobs and a considerable interval before the appointment of his successor did not suspend the effect of the efflux of time. In this respect the rule of the statute of limitations must apply. If time begins to run when competent parties are in existence to represent both sides of the controversy, it continues to run notwithstanding the death or disability of the person whose rights may be barred. *Ballard* v. *Demmon*, 156 Mass. 449, 453. *Hogan* v. *Kurtz*, 94 U. S. 773, 779. *Bower* v. *Chetwynd*, [1914] 2 Ch. 68, 76.

It was said by Mr. Justice Sheldon, speaking for the court, in *Whitney* v. *Cheshire Railroad*, 210 Mass. 263, at page 268, with ample citation of authorities, "The rule has been laid down that where a demand is necessary to fix the legal rights of a party and give a complete cause of action, the demand ordinarily must be made within the time limited for bringing an action at law." The plaintiff contends that this rule is confined in its operation to cases where an executory contract calls for the performance of some act upon demand. But while many instances where it has been invoked are of that nature, the rule is general in its scope

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and applies commonly where no fiduciary relation exists. An indeterminate bailment is distinguishable. *Wilkinson* v. *Verity*, L. R. 6 C. P. 206.

That principle governs the present case. While a pledge sometimes has been spoken of as in the nature of a trust, *Newton* v. *Fay*, 10 Allen, 505, 507, strictly it has not the legal characteristics of a trust and a transaction like that here shown is a pledge with the incidents attaching to that well recognized relation. *Gamson* v. *Pritchard*, 210 Mass. 296. *Shaw* v. *Silloway*, 145 Mass. 503. The lapse of twenty-eight years without any excuse other than appears upon the face of this bill is fatal to the maintenance of this suit. There is nothing to indicate fault on the part of the defendants in this respect or any conduct by deception or otherwise to prevent seasonable action by the plaintiff. It is not the province even of equity to afford relief against the natural consequences of such protracted slumber upon rights of the character here alleged. *Kase* v. *Burnham*, 206 Penn. St. 330. *Gilmer* v. *Morris*, 80 Ala. 78, 83. *Mackall* v. *Casilear*, 137 U. S. 556, 566. *Waterman* v. *Brown*, 31 Penn. St. 161. See *Brown* v. *Bronson*, 93 App. Div. (N. Y.) 312. The case has been ably presented in behalf of the plaintiff, but the best argument is unavailing upon these facts.

Decree affirmed with costs.

F. L. Simpson, for the plaintiff.

C. R. Lamson, (*D. G. Clark* with him,) for the defendants.

ROLLIN E. HARMON, Judge of Probate (for the benefit of the National Casket Company), *vs.* JOHN L. SWEET, administrator, & another.

SAME (for the benefit of the Porter Livery Company) *vs.* SAME.

Essex. March 11, 1915. — September 16, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Bond. Executor and Administrator. Insolvent Estate of Deceased Person. Practice, Civil, Agreement as to facts, Appeal. *Judgment,* On bond.

If, upon demand being made, an administrator with the will annexed of an estate which has not been represented to be insolvent neglects to pay an

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execution issued on a judgment against him in his official capacity or to show sufficient goods or estate of the testator to satisfy the judgment, there is *prima facie* a breach of his bond given as prescribed by R. L. c. 149, § 1, cl. 1.

The provision of R. L. c. 149, § 20, that "Bonds given by executors or administrators for the performance of their trust may be put in suit by a creditor of the deceased for his own benefit, when such creditor has recovered judgment for his debt against the executors or administrators and they have neglected upon demand made by him to pay the same or to show sufficient goods or estate of the deceased to be taken on execution for that purpose," not only gives the judgment creditor, where the estate has not been represented to be insolvent, a right to put the bond in suit without obtaining authority to do so from the Probate Court, but, taken in connection with the whole scheme for winding up the estate of a deceased person as provided for by our statutes, it also means that the failure under the circumstances stated to pay or to exhibit sufficient goods or estate of the deceased is *prima facie* a breach of the second condition of the executor's or administrator's bond.

By R. L. c. 142, § 2, which provides that "If the probate court finds from the representation of an executor or administrator that the estate of the deceased will probably be insufficient for the payment of his debts, it may appoint two or more commissioners to receive and examine all claims of creditors against such estate, and to return a list of all claims presented to them, with the amount allowed on each claim," it is made the duty of an executor or administrator to represent the estate of the deceased to be insolvent if it appears that the estate is insufficient to pay all debts of which he has had notice.

Where as stated above there is *prima facie* a breach of the second condition of the bond of an administrator, the administrator is liable on his bond unless he represents the estate to be insolvent and establishes under R. L. c. 141, § 5, the affirmative defence that upon the settlement of his account in the Probate Court the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased.

To establish such an affirmative defence based on a representation of insolvency it must appear by a final adjudication that the estate is insolvent.

After the representation of insolvency is made, the administrator and his sureties are entitled to have the action on the bond continued until the result of the representation of insolvency is ascertained.

Where an action at law is heard by a judge without a jury, and the parties instead of putting in their evidence agree in writing upon certain facts on which the case is to be decided under the pleadings, this is not a submission of the case upon an agreed statement of facts, and, if there is an appeal from a judgment based on the finding of the judge in such a case, the question for this court is whether as matter of law the finding was warranted.

It here was *said* that, when an action by a creditor against the administrator of the estate of a deceased debtor is pending and is about to result in a judgment in favor of the creditor and there is a doubt whether the estate of the deceased debtor is solvent or insolvent, the administrator at that time, before the judgment is obtained, should represent the estate to be insolvent, if he has not done so already.

Where two actions against the surety on an administrator's bond, each brought by a separate judgment creditor under R. L. c. 149, § 20, had been tried together,

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it was *said*, that, although each of the creditors under the circumstances that existed had a right to put the bond in suit, it was plain that the surety was not subject to have two judgments entered against him, each for the penal sum of the bond, and that *it would seem* that both actions might be prosecuted until judgment was recovered in one of them and that then the fact that judgment had been recovered in that action would be a bar to entering judgment in the other, but that *whether* this was the proper way to preserve and give effect to the rights of all the parties it was not necessary to decide at the present time.

LORING, J. Horace W. C. Sweet died testate some time before November 29, 1909, at a date not stated in the record. On November 29, 1909, John L. Sweet was appointed administrator with the will annexed of Horace W. C. Sweet's estate and gave a bond in statutory form with the defendant surety company as surety. "Within three months thereafter" he gave notice of his appointment. "Thereafter" (at a date not stated in the record), he filed an inventory "showing personal property to the value of $1,290.29, and real estate to the value of $3,000, subject to a mortgage of $1,700."

On the first Monday of January, 1912, the Porter Livery Company recovered judgment against John L. Sweet as administrator as aforesaid, in the sum of $1,279.65 with costs to the amount of $11.63. On May 6, 1912, the National Casket Company recovered a similar judgment against him in the sum of $1,324.44.

Executions were issued on both of the judgments. On January 5, 1912, the Porter Livery Company caused demand to be made upon the administrator for payment of the execution, but he neglected and refused to pay the judgment or to show to the deputy sheriff sufficient goods or estate of the deceased to be taken on execution for that purpose. At some time not stated in the record, the National Casket Company, after taking out execution on the judgment recovered by it, made due demand upon the administrator, but Sweet neglected or refused to pay that judgment or to show to the deputy sheriff sufficient goods or estate of the deceased to be taken on execution for that purpose. Afterwards (on dates not stated in the record), the two actions now before us were brought on the same bond, one by each of the two judgment creditors. John L. Sweet died on January 26, 1913, after the actions were brought.. Subsequently the plaintiffs discontinued against the principal defendant (John L. Sweet, administrator

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as aforesaid). Since that time both of the actions have been prosecuted against the defendant surety company alone.

On April 21, 1913, the executors of the will of John L. Sweet filed an account for him as administrator of Horace W. C. Sweet, showing the exhaustion of the personal estate in the payment of the aforesaid mortgage note and charges of administration. This account was allowed by the Probate Court on the same day, without notice to creditors by publication or otherwise. A petition by these plaintiffs to reopen that account is now pending. On April 22, 1913, the estate of Horace W. C. Sweet was represented and adjudged to be probably insolvent. The real estate has not yet been sold.

The parties in each case agreed upon certain facts set forth in a written agreement. Thereafter the cases were heard by a judge * sitting without a jury. He made the following finding: "From the statement of agreed facts I conclude and find that at the date of the demand upon the administrator he had not in his hands sufficient moneys of said estate to pay said judgment, the personal estate having been theretofore properly and lawfully expended by him, and that there was not, otherwise, any failure to properly administer the estate." In addition he made a general finding for the defendant in each case. On these findings judgment was entered for the defendants and from those judgments the plaintiffs took the appeals which are now before us.

The special finding of the judge below doubtless was based on the following facts agreed to by the parties: "The said John L. Sweet had been endeavoring to sell the real estate belonging to his testator for a sufficient sum to pay, together with the personal estate in his hands, all the debts of his testator lawfully due and payable. The personal estate in his hands was insufficient for this purpose and the market for the real estate was slow and narrow. The real estate was worth enough, if sold at a fair price, to ensure the payment of all debts of the testator."

The defendant surety company (in effect) has argued that the case presented to the administrator with the will annexed was the case of an estate where the personal property was sufficient to pay off a mortgage on a parcel of real estate which, if sold at auction,

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* *Quinn*, J.

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would not be sufficient to pay the debts of the testator because the market for it "was slow and narrow," but which "if sold at a fair price," would realize enough to pay "all debts of the testator." Under these circumstances it was (or at least could be found by the judge to have been) the duty of the administrator to do what he did, namely, to endeavor to sell the real estate "at a fair price" and thus pay the testator's debts in full. That to do that he had to obtain a license to sell the real estate at private sale, and he could not obtain such a license until he had obtained a bid; R. L. c. 146, § 9; and that he had not been able to obtain a fair bid before he died although he had been endeavoring so to do; that under these circumstances the special finding of the judge, if not required by the facts agreed upon, was at least warranted by them.

We pass by the objection that the finding is based on facts submitted to the Superior Court at the trial of the action brought for breach of the probate bond in place of on the facts shown by the settlement of the administrator's accounts in the Probate Court. The finding is open to that objection. But that is not the objection to it which is decisive.

The decisive objection is that where the estate has not been represented insolvent there is *prima facie* a breach of the second condition * of an executor's or administrator's bond when on demand being made he neglects to pay an execution issued on a judgment against him in his official capacity or to show sufficient goods or estate of the deceased to satisfy it.

Whether there is a breach of the executor's or administrator's bond under these circumstances depends upon the construction to be given to R. L. c. 149, § 20.† Interpreted literally the pro-

* The second condition of the bond of an administrator with the will annexed, as prescribed by R. L. c. 149, § 1, cl. 1, is as follows: "Second, To administer according to law and to the will of the testator all personal property of the testator which may come into his possession or into the possession of any person for him, and also the proceeds of any of the real property of the testator which may be sold or mortgaged by him."

† R. L. c. 149, § 20, is in these words: "Section 20. Bonds given by executors or administrators for the performance of their trust may be put in suit by a creditor of the deceased for his own benefit, when such creditor has recovered judgment for his debt against the executors or administrators and they have neglected upon demand made by him to pay the same or to

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visions of that section are satisfied by construing it to give the judgment creditor a right to put the bond in suit without obtaining the authority of the Probate Court to take that action. But taken in connection with the scheme of the proper winding up of the estate of a deceased person as a whole and in connection with the sections following it, we are of opinion that by the true import of this section the failure under the circumstances stated in R. L. c. 149, § 20, to pay or to exhibit sufficient goods or estate of the deceased *prima facie* is a breach of the second condition of the executor's or administrator's bond in case of an estate which has not been represented insolvent.

By R. L. c. 141, § 1, no action can be brought by a general creditor of the estate against an executor or administrator until after the expiration of one year from his giving bond for the performance of his trust. And by § 2 of the same chapter, on the expiration of that year the executor or administrator (who has given due notice of his appointment) can pay all debts of which he has had notice provided that, based upon the demands of which he has had notice, the estate is not insolvent. After the expiration of two years no action can be brought against the estate provided the executor or administrator gave due notice of his appointment. R. L. c. 141, § 9. If during the intervening year a creditor for the first time presents his claim he is entitled to be paid out of the surplus funds left in the hands of the executor or administrator, if there be any. By R. L. c. 142, § 2, * it is (in effect) made the duty of an executor or administrator to represent the estate insolvent if it appears that the estate is insufficient to pay all debts of which he has had notice, in order that the estate may be ratably distributed among the creditors.

The effect of these provisions is: (First) to make debts owed by the testator or intestate due one year after an executor or adminis-

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show sufficient goods or estate of the deceased to be taken on execution for that purpose."

* R. L. c. 142, § 2, is as follows:

"If the Probate Court finds from the representation of an executor or administrator that the estate of the deceased will probably be insufficient for the payment of his debts, it may appoint two or more commissioners to receive and examine all claims of creditors against such estate, and to return a list of all claims presented to them, with the amount allowed on each claim."

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trator has given bond for the performance of his trust. The executor or administrator has a year in which to find out whether the estate is solvent, and for that reason no action can be brought against him until the year has expired. The second effect of these provisions is that in case of an estate which has not been represented to be insolvent it is the duty of the executor or administrator to reduce the estate into cash by the end of the year at least so far as may be necessary to pay the debts due from the deceased. At the end of the year a creditor not only can bring suit if the claim due him from the deceased is not paid, but before the enactment of St. 1907, c. 553, he could have secured payment of the judgment (when recovered) by attaching on mesne process any goods or estate of the deceased which he could lay hands upon, and he still can satisfy the judgment recovered by him out of any goods or estate of the deceased which he can find. This right is given by R. L. c. 172, § 5. See for example *Gore* v. *Brazier*, 3 Mass. 523; *Cooke* v. *Gibbs*, 3 Mass. 193, 197; *Harmon* v. *Osgood*, 151 Mass. 501. The right originally given to the creditor to attach the goods or estate of the deceased on mesne process and the right which he still has to take them on execution were given not to afford him an opportunity to get priority over other creditors of the deceased. It was not and is not intended that one creditor of a deceased person should obtain a preference over his other creditors. But the right of attachment on mesne process which existed before St. 1907, c. 553, and the right of levying execution on any goods or estate of the deceased (which still exists) were given to the deceased's creditors because (when the estate has not been represented to be insolvent and the year given to the executor or administrator in which to turn the assets into cash has expired) all creditors are under the circumstances entitled to be paid and to have the cash forthcoming with which the payment is to be made. The substance of these considerations is not affected by the substitution of a right of attachment in the discretion of the judge of the Probate Court for the absolute right of attachment that existed before St. 1907, c. 553.

It is in the light of all these conditions that R. L. c. 149, § 20, is to be construed. The fair import of the provisions of that section, construed in the light of these conditions, is that an executor or

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administrator of an estate which has not been represented insolvent who does his duty will pay on demand an execution issued on a judgment recovered against him in his official capacity, or will "show sufficient goods or estate of the deceased to be taken on execution for that purpose." In other words that the failure to do at least one or the other of these two things is a breach of his duty and so of his official bond, and that the creditor can thereupon as of right put his bond in suit without obtaining the authority of the Probate Court to take that action.

This conclusion is reinforced by the wording of § 23 and the provisions of §§ 21 and 22 taken in connection with § 20 and § 23. Section 23 provides that the Probate Court may authorize the executor's or administrator's bond to be put in suit if it "finds that the executor or administrator has failed in any manner not specified in the three preceding sections to perform the conditions of his bond." * This is a plain implication that in case of the three preceding sections there is a failure to perform the conditions of the bond. And this implication (that there is a breach of the probate bond in the cases described in R. L. c. 149, §§ 20–23) was intended by those who first drafted the statutory provision which is now R. L. c. 149, § 23. That section was drafted by the Commissioners of the Revised Statutes. In a note to Rev. Sts. c. 70, § 3 (now R. L. c. 149, § 20), it is said: "When a creditor has recovered judgment for his debt, there is no longer any question of the liability of the executor or administrator to pay the amount, and of course if it is not paid, the creditor is allowed, by the 3rd section to put the bond immediately in suit, without any previous authority or order from the judge of probate. This will not prevent his proceeding against the executor or administrator for waste, if he should prefer that remedy; but a suit on the bond will in general be determined as expeditiously as a suit on a suggestion of waste; and it will be more effectual, as furnishing a resort at once to the sureties, as well as to the executor or administrator."

* R. L. c. 149, § 23, is in these words: "Section 23. If the Probate Court, upon the representation of any person interested in an estate, finds that the executor or administrator has failed in any manner not specified in the three preceding sections to perform the conditions of his bond, it may authorize any creditor, next of kin, legatee or other person aggrieved by such maladministration to bring an action on the bond."

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In addition to the implication which comes from the wording of § 23 there is the fact that by the provisions of § 23 a case covered by § 20 is put on the same footing as cases covered by §§ 21, 22. And in case of §§ 21 and 22 there is confessedly a breach of the conditions of the bond.*

The conclusion that by its true construction R. L. c. 149, § 20, imports that a failure on the part of an executor or administrator of an estate not declared insolvent to pay or exhibit sufficient goods or estate of the deceased is a breach of his official bond is confirmed by the rights given to a legatee. If at the end of the year an executor has not paid a legacy he can be sued in contract for it (R. L. c. 141, § 19) and is personally liable (at least on the legatee's showing that the testator left assets) unless the executor goes forward and shows that he has exhausted the assets in paying persons who had claims on the estate superior to those of the legatee. *Fitch* v. *Randall*, 163 Mass. 381. It would be an anomaly to make the executor personally liable to a legatee at the end of the year (unless he showed in a proper way an exhaustion of assets) and not to make him personally liable to a creditor of the deceased who had established the debt due him by a judgment against the executor or administrator in his official capacity, had taken out execution and had failed to get satisfaction of it.

It always has been the rule that before a creditor of the deceased has recovered judgment against the estate the executor or administrator could represent the estate to be insolvent and by pursuing the matter with due diligence (as to which see *McKim* v. *Roosa*, 183 Mass. 510) could prevent the action from ripening into a judgment. In *Newcomb* v. *Goss*, 1 Met. 333, it was held that the last opportunity for representing the estate to be insolvent was before judgment was recovered against the executor or administrator sued in their official capacity, and that a representa-

* R. L. c. 149, §§ 21 and 22 are in these words:

"Section 21. A creditor of an estate which has been represented insolvent may bring such action if the amount due to him has been ascertained by the decree of distribution, and the executor or administrator neglects upon demand to pay such amount.

"Section 22. Such action may be brought by a person who is next of kin to recover his share of the personal property after a decree of the Probate Court ascertaining the amount due to him, if the executor or administrator neglects upon demand to pay such amount."

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tion of insolvency could not be made in an action on the bond brought under what is now R. L. c. 149, § 20. That case was overruled in *Fuller* v. *Connelly*, 142 Mass. 227, and that was confirmed in *McKim* v. *Roosa*, *ubi supra*. In the former of these two cases it was held that the liability of an executor or administrator on his official bond was not greater than it was on *scire facias* brought under what is now R. L. c. 172, § 8, to charge an executor or administrator with waste. And it being established that in *scire facias* against an executor or administrator the estate could be represented insolvent and the defence consequent upon that made out (if it could be made out), the same could be done in an action brought under what is now R. L. c. 149, § 20, on the official bond of the executor or administrator. The defence set up in *Fuller* v. *Connelly*, *ubi supra*, was the statutory equivalent of the defence (which is initiated by a representation of insolvency) set forth in what is now R. L. c. 141, § 5.*

There are expressions in *Fuller* v. *Connelly*, *ubi supra*, 229, 230, from which it might be thought that the only effect of R. L. c. 149, § 20, was to authorize a creditor to put the probate bond in suit (under the circumstances there described), and that the failure to pay or to show sufficient goods or estate to satisfy an execution duly taken out by a judgment creditor was not of itself a breach of the probate bond on which the executor or administrator and their sureties are liable. It well may be doubted whether the expressions in *Fuller* v. *Connelly*, just referred to, ought to be taken to go so far as is intimated above. In this connection it is of importance that "The only breach alleged [in *Fuller* v. *Connelly*] is that the plaintiff recovered judgment against the administratrix, which she refused to pay upon demand" (see page 227); and by reference to the original papers the question reported to the full court was that raised by the pleadings and the agreed facts. However that may be, Chief

* R. L. c. 141, § 5, is in these words: "If it appears, upon the settlement of the account of an executor or administrator in the Probate Court, that the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased, such settlement shall be a bar to an action brought against him by a creditor who is not entitled to such preference, although the estate has not been represented insolvent."

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Justice Knowlton, in delivering the opinion of this court in *McIntire* v. *Cottrell*, 185 Mass. 178, 180, thought that there was a breach of the bond in such a case. He said: "The stipulation in the bond which applies to this case is that the administrator shall administer according to law all the personal estate of the deceased which shall come to his possession, etc. This implies that he shall pay the debts if he has assets. But there is no violation of this stipulation as to any debt, until it has been established by a judgment, and the administrator has failed to pay the judgment on demand. Pub. Sts. c. 143, § 10. (R. L. c. 149, § 20.) . . . Even then the administrator and the sureties may defend successfully by showing that the assets have been used according to law. *Fuller* v. *Connelly*, 142 Mass. 227. The demand upon the administrator after judgment is not merely a preliminary, which stands instead of an authorization by the Probate Court to bring a suit upon a previously existing debt, but it is an essential to the creation of the debt itself upon the bond. Until the demand is made, it cannot be known that the administrator will not pay the judgment. The liability on the bond is contingent upon his failure to pay on demand."

We are of opinion that a failure to pay an execution issued on a judgment obtained against an executor or administrator in his official capacity, or to show sufficient goods or estate of the deceased to satisfy it, is a breach of the executor's or administrator's bond, and that unless the affirmative defence which is initiated by a representation of insolvency or its statutory equivalent set forth in R. L. c. 141, § 5 (both of which, under the decision in *Fuller* v. *Connelly*, may be initiated pending the action on the bond), is made out they and their sureties are liable.

In the case at bar the breach alleged is the failure to pay or to show sufficient goods or estate under the circumstances set forth in R. L. c. 149, § 20, as was the case in *Fuller* v. *Connelly*, *ubi supra*. On the facts agreed upon under which the parties went to trial that allegation was proved.

However, the estate now has been represented insolvent and an adjudication of probable insolvency has been made. But that does not make out an affirmative defence. To make out an affirmative defence based on a representation of insolvency it must appear by a final adjudication that the estate is insolvent. After

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a representation of insolvency is made, the executor or administrator and their sureties are entitled to have the case continued until the result of the representation of insolvency is ascertained. These several propositions were decided in *McKim* v. *Roosa*, 183 Mass. 510, and in *Fuller* v. *Dupont*, 183 Mass. 596.

The two cases now before us were not cases stated. Nor were they cases submitted on agreed facts with a right to draw inferences of fact. They were cases in which the parties had pleaded to an issue of fact and after having done that they agreed upon the facts upon which that issue of fact was to be decided in place of proving those facts by evidence. Under these circumstances there is no submission of the case to the court on agreed facts, but the facts on which the case is to be tried under the pleadings are agreed upon. We are of opinion however that the rule established in *Ingalls* v. *Hobbs*, 156 Mass. 348, *Harvard Brewing Co.* v. *Pratt*, 185 Mass. 406, and *Webber* v. *Cambridgeport Savings Bank*, 186 Mass. 314, should be extended to such a case, and that an appeal taken from a judgment on a finding made in such a case raises the question whether as matter of law the finding was warranted.

Although it was decided in *Fuller* v. *Connelly*, *ubi supra*, that the defence which arises out of a representation of insolvency, when pursued with due diligence to its termination, can be set up in an action on a bond brought by a judgment creditor under R. L. c. 149, § 20, yet it ought not to be inferred that that is the proper time for making a representation of insolvency. If at the time that a litigated claim against the estate is about to result in a judgment in favor of the creditor there is doubt (arising either from uncertainty as to the amount to be realized by a sale of the assets or as to the claims which will be ultimately established against the estate) as to the solvency or insolvency of the estate, the proper time to represent the estate to be insolvent (if it has not theretofore been represented insolvent) is before that claim passes into judgment. It is now provided by R. L. c. 142, § 32, that execution shall not issue on judgments obtained before a representation of insolvency is made and a certified copy from the Probate Court showing the representation of insolvency has been filed in the clerk's office of the court in which the judgment was rendered. But unless that is done (as we have said

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before) the judgment creditor can levy under his execution upon any goods or estate belonging to the executor or the intestate under R. L. c. 172, § 5. See *Harmon* v. *Osgood*, 151 Mass. 501; *Gore* v. *Brazier*, 3 Mass. 523; *Look* v. *Luce*, 136 Mass. 249. For example, before the representation of insolvency was made in the cases at bar, either one of the plaintiffs in these two actions could have levied upon the real estate which the administrator preserved by paying off the mortgage upon it. If it had done so and that real estate had not produced enough to pay both judgments, without question the administrator and his sureties would have been liable on his probate bond.

There is one matter that ought to be noticed to prevent a misapprehension. The two actions now before us are brought upon the same bond. The statute (R. L. c. 149, § 20) gives a creditor in the position in which the two creditors in the two actions now before us were, a right to put the bond in suit under the circumstances which existed. Of course the defendant surety company is not subject to two judgments against it each for the penal sum of the bond. It would seem that both actions might be prosecuted until judgment was recovered in one and that the fact that judgment had been recovered in one would be a bar to entering judgment in the other. But whether this is the proper way of working out the rights of the parties it is not necessary now to decide.

The result is that the judgments must be reversed and the cases must stand to await proceedings in the Probate Court, founded upon the representation of insolvency made by the administrator *de bonis non*. It is

So ordered.

F. M. Copeland, for the plaintiff in the first case.

M. S. Case, for the plaintiff in the second case, submitted a brief.

H. R. Bygrave, for the defendant the Title Guaranty and Surety Company.

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JOSEPH R. WALKER, administrator with the will annexed, *vs.* TREASURER AND RECEIVER GENERAL.

Berkshire. March 15, 1915. — September 16, 1915.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions. *Statute*, Construction. *Power*.

Statutes relating to taxation by a necessary implication do not extend beyond the jurisdiction of the State enacting them.

Under St. 1909, c. 490, Part IV, § 1, and St. 1909, c. 527, § 8, the exercise by a testator, whose domicil was in this Commonwealth and whose will was proved here, of a power of testamentary appointment given to him by the will of a testator, whose domicil was in another State, transferring by such appointment the title to personal property held by a trustee in such other State, is not subject to a succession tax.

The so called succession tax imposed by our statutes on the passing of property by the exercise of a power of appointment is an excise upon the commodity of the privilege of passing title under the sanction and protection of the laws of this Commonwealth, and the statutes imposing such excise have no application where the property transferred by the exercise of the power is not physically within the jurisdiction of this Commonwealth and the succession to it does not depend on any privilege conferred by our laws.

RUGG, C. J. This is a petition * brought by the administrator with the will annexed of the estate of Anna Eliza Barnard, late of Sheffield in this Commonwealth, to determine the liability of that estate to the Commonwealth for a succession tax in respect of certain property held in trust by the Mercantile Trust and Deposit Company of Baltimore, a corporation having its usual place of business in Baltimore in the State of Maryland. James McHenry Boyd, the first husband of the testatrix, died in 1849. By his last will, duly allowed by the court of appropriate jurisdiction in Maryland, the State of his domicil, he left the residue of his estate to Maryland trustees, in trust, to pay the income to the testatrix during her life and upon her death to pay the principal to her heirs or to such persons as she might by

* Under St. 1909, c. 490, Part IV, § 21, filed in the Probate Court for the county of Berkshire on March 16, 1914. The Treasurer and Receiver General appealed from the decree of that court. At the request of the parties the appeal was reserved by *Carroll*, J., for determination by the full court.

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will designate. The testatrix died in 1911, leaving as her heirs at law three children of a subsequent marriage. Her will disposed of certain real estate in Sheffield and personal property and gave the residue, including the trust fund here in question, to the Mercantile Trust and Deposit Company of Baltimore upon certain trusts. The *corpus* of the Boyd trust fund at the time of the death of the testatrix and since was personal property in the hands of the Mercantile Trust and Deposit Company and held in possession continuously outside this Commonwealth and within the State of Maryland. The validity of the testamentary disposition by Mrs. Barnard of the fund in the hands of the trust company is challenged, but that point in the view we take of the case is not of decisive consequence upon the issue here depending.

The question to be decided is whether such personal property is under these circumstances subject to the succession tax imposed by our statutes.* The tax thus imposed is strictly an excise and

* St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1, is as follows: "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will . . . to any person . . . [with exceptions not here material] . . . shall be subject to a tax. . . ."

St. 1909, c. 527, § 8, is as follows: "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. . . ."

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not a property tax. The privilege of passing the title to property is the commodity upon which the excise is laid. *Minot* v. *Winthrop*, 162 Mass. 113.

It is an implied condition of all statutes relating to taxation that they have no extraterritorial effect. They can apply in the nature of things only to property within the jurisdiction of the sovereign State enacting the legislation, either actually through physical location or constructively through control over the person of one essentially connected therewith. The test stated in *Clark* v. *Treasurer & Receiver General*, 218 Mass. 292, and that decision do not control the case at bar. In the instant case the property was actually in the State of Maryland. Its title was vested in the trustee resident there. Both its physical and constructive *situs* is in the State of Maryland. Massachusetts has no control either of the property or its owner. An excise tax may be upheld upon the succession to property where a direct property tax might not be sustained. But in such cases it can stand as a lawful exercise of the taxing power only when some necessary incident of the transfer of title depends for its efficacy upon the law of the State levying the tax. Under our own Constitution the "commodity" which may be taxed in the absence of corporeal jurisdiction over the property itself is the privilege of passing title under the sanction and protection of our law. *Attorney General* v. *Barney*, 211 Mass. 134. *Bliss* v. *Bliss*, *ante*, 201. *Keeney* v. *New York*, 222 U. S. 525, 537. *Wheeler* v. *New York*, 233 U. S. 434. The antithesis of this proposition is that where the property is not physically within the jurisdiction of the taxing power and its complete succession may be accomplished without invoking any privilege or sanction conferred by its laws, then there is nothing to which taxation can attach. If the property in Maryland had belonged to Mrs. Barnard, it would have been subject to the tax. *Frothingham* v. *Shaw*, 175 Mass. 59. But it did not belong to her. She had no title to it. She simply had the power of disposition if she chose to exercise it. This power does not constitute it her property. *Emmons* v. *Shaw*, 171 Mass. 410. The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power. The property in the case at bar

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was not that of Mrs. Barnard, but of her first husband, who established the trust and created the power. Her own estate is ample to pay all debts, so there is no room for the application of *Clapp* v. *Ingraham*, 126 Mass. 200. If she has exercised the power, the instrument whereby that has been brought about takes effect not as a disposition of her own property but as an appointment of property of her first husband under the power conferred by his will. The appointees will take not as legatees of Mrs. Barnard but as grantees or donees of Mr. Boyd or the trustees who are his representatives. *Heath* v. *Withington*, 6 Cush. 497. *Sewall* v. *Wilmer*, 132 Mass. 131, 136. If she has failed to exercise the power conferred upon her, the devolution of the trust fund to her heirs takes place by virtue of the will of Mr. Boyd, which will be given efficacy by the law of Maryland, the State of his domicil. In either event, the *situs* of the property does not attach to the domicil of the donee of the power.

It was established in *Sewall* v. *Wilmer* that property in the hands of domestic trustees appointed under the will of a domestic testator, who conferred a power of appointment upon a non-resident, must be distributed according to the law of this Commonwealth and that the execution of the power must be interpreted according to our law and in conformity to the power conferred. It has been held in numerous cases that a power to appoint by will may be exercised by an instrument valid as a will in the jurisdiction where the power is established, although not valid as a will in the domicil of the donee. The principle is that whether the power has been exercised is to be determined by the law of the domicil of the donor of the power. *Murphy* v. *Deichler*, [1909] A. C. 446. *Rhode Island Hospital Trust Co.* v. *Dunnell*, 34 R. I. 394. *Bingham's Appeal*, 64 Penn. St. 345. Inferentially, if not expressly, this is established by *Sewall* v. *Wilmer*, 132 Mass. 131. It is the law of Maryland. *Bearn* v. *Winans*, 111 Md. 434. The will of Mr. Boyd in creating the power of appointment did not provide that the power must be exercised by a will executed according to the law of the domicil of the donee, to be proved and allowed in its courts. See *Rackemann* v. *Taylor*, 204 Mass. 394. A different question would be presented if that had been the case. Any instrument recognized by the courts of Maryland as an exercise of the power is sufficient. It is the settled law of

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Maryland that in a case like the present "the appointee takes title not under the will making the appointment, but directly from the donor of the power and 'in like manner as if the power and the instrument executing it had been incorporated in one instrument.'" *Bearn* v. *Winans*, 111 Md. 434, 470.

It follows that no privilege by which the property passes, whether by exercise of the power or by failure to exercise it, is conferred by the law of this Commonwealth. Hence no commodity exists here on which the tax can be levied. By resort to the courts of Maryland all questions as to the succession of this trust estate will be determined without invoking the law of Massachusetts. That will be settled without dependence upon the moral support or actual assistance of our laws. *Bliss* v. *Bliss*, *ante*, 201. The circumstance that the will has been set up in this Commonwealth is not of controlling significance. There is nothing in this Commonwealth upon which St. 1909, c. 527, § 8, can operate.

Decree of the Probate Court affirmed.

P. Ketchum, (*E. M. Dodd* with him,) for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

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The mere employment of an attorney at law by the owner of a building to enforce the collection of rent due from a lessee or the ejectment of the lessee does not give to the attorney at law power to make with a general lessee of the building in behalf of his client and without the client's special consent an executory agreement to indemnify such general lessee against any loss he may suffer by reason of claims of sublessees under leases given by him. *Ibid.*

The language of a general power of attorney under seal was held not to confer upon the attorney power to delegate his power to an attorney at law in the absence of a special provision to that effect in its provisions or unless it appears from the nature of the agency that the parties contemplated that the employment of such agent would be necessary. *Ibid.*

Application of the foregoing principle, where it appeared that two owners of a building by separate instruments gave a general power of attorney to a certain person to manage the property for them, one instrument specifically conferring a power of delegation of authority, and the other omitting such a provision, and it was held that an attorney at law employed by the person appointed in the instruments did not derive from the powers of attorney any authority to make on behalf of the owners with a tenant an agreement of indemnity, and that such an agreement could not be enforced. *Ibid.*

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If a contract of subscription to a scholarship contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," a guarantor of the contract, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract. *International Textbook Co.* v. *Martin*, 1.

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And, it appearing that the questions under correct instructions had been left to the jury, who found for the plaintiff, an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled. *Ibid.*

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See that subtitle under NEGLIGENCE.

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See that subtitle under EQUITY PLEADING AND PRACTICE; LAND COURT; PRACTICE, CIVIL; PROBATE COURT.

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ASSAULT AND BATTERY.

When on a railroad train the conduct and speech of one passenger toward another is such that violence is likely to result unless some action is taken to prevent it, and the railroad corporation has reasonable notice of the situation and has an opportunity to take measures to prevent the impending violence, it becomes the duty of the corporation to protect the threatened passenger and to see that no harm comes to him. *Isenberg* v. *New York, New Haven, & Hartford Railroad*, 182.

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ASSESSMENT.

See TAX.

ASSIGNMENT.

For Benefit of Creditors.

It is not necessary to the validity of a common law assignment for the benefit of creditors that notice of it should be given to the debtors of the assignor. *Cropper* v. *Gorham*, 119.

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A common law assignment for the benefit of creditors made in consideration of the release by the assignee, who was a creditor of the assignor and signed the instrument of assignment, and by other creditors, who assented in writing to the assignment, of their claims against the assignor, is valid against subsequent attachments made by creditors who did not assent to the assignment. *Cropper* v. *Gorham*, 119.

In an action by the assignee of an insolvent debtor under a common law assignment in writing clearly stated to be for the benefit of creditors to collect a debt admitted to be due to such debtor, testimony of the insolvent assignor that he understood the assignment to be for the benefit of some of his creditors and not for the benefit of all of them cannot affect the construction of the instrument of assignment. *Ibid.*

Although after the making of a common law assignment for the benefit of creditors continued possession by the assignor of the property assigned often is evidence of fraud, yet it is not conclusive evidence, and the circumstances may be such as to show that there was no fraud. *Ibid.*

Neither the validity nor the character of an assignment for the benefit of creditors is affected by a failure to record it in accordance with the requirements of R. L. c. 147, §§ 21, 22. *Collector of Taxes of Boston* v. *New England Trust Co.* 384.

An instrument of trust which provided that, because of the pendency in the United States Supreme Court of two suits in which no supersedeas bonds had been given, "and for other reasons," the grantor sold and conveyed property to the trustee with full power to hold it, to sell it when in his discretion it was good business judgment to do so to fulfil certain business obligations of the creditor, and, at the termination of the pending litigation, to convert the property into cash and to distribute it substantially in accordance with the provisions of the national bankruptcy act to such creditors as assented to the provisions of the trust, paying the balance, if any, to the grantor, was held to be an assignment for the benefit of creditors and not a mortgage or pledge. *Ibid.*

On certain facts it was held that a certain person who made an assignment for the benefit of his creditors had a place of business after the assignment within the meaning of St. 1909, c. 490, Part I, § 23, cl. 8, which determined where the property in the hands of the assignee should be assessed for taxation, and that such place of business was Boston. *Ibid.*

Of Chose in Action.

A right of action to recover damages for the breach of a contract for support is assignable and R. L. c. 173, § 4, gives the assignee the right to sue on the contract in his own name. *Bryne* v. *Dorey*, 399.

It seems that a *bona fide* assignee of a balance of the proceeds from a sale of merchandise in bulk, who took the assignment in part payment of a debt justly due to him from the seller, where the sale was voidable by the general creditors of the seller because notice of it was not given to such creditors as required by St. 1903, c. 415, is entitled to hold such balance against a general creditor who after the assignment institutes proceedings to avoid the sale. *Rabalsky* v. *Levenson*, 289.

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Assignment (*continued*).

Of Lease.

An oral agreement that a surrender of a lease of land shall operate, as between the lessor and the lessee, as an assignment of the lease so that the lessor shall stand in the lessee's stead as to sublessees, is inoperative by reason of the provisions of R. L. c. 127, § 3. *Smith* v. *Abbott*, 326.

Of Liquor License.

It was held that one, to whom the trustee in bankruptcy of the holder of a license of the first class to sell intoxicating liquors on certain premises in Boston, and to whom on that day the board issued a first class license and who thereafter held such a license for less than two years, had not "held a license for the sale of intoxicating liquors upon said premises . . . for the two years next preceding the date of his application," within the meaning of R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, and therefore that under the provisions of that section the licensing board must refuse to grant the application where an owner of real estate within twenty-five feet duly objected in writing. *Adams* v. *Licensing Board of Boston*, 429.

Of Wages and "Future Earnings."

Action by a workman in a shoe factory against a corporation doing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant. *Kennedy* v. *Hub Manuf. Co.* 136.

Certain facts were held to warrant a finding that an account originally held by one B against a workman had been transferred by him to a corporation which succeeded to B's business and that an assignment of wages executed under a power of substitution in a power of attorney executed by the workman was made to the corporation. *Ibid.*

On the facts in evidence in a suit in equity by a trustee in bankruptcy to avoid as an unlawful preference an assignment of a debt made by the plaintiff's bankrupt within four months before the filing of his voluntary petition in bankruptcy, it was held that it could not be found that the bankrupt was insolvent at the time he made the assignment, and therefore that no unlawful preference under the provisions of the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 11, was shown. *Jump* v. *Bernier*, 241.

A certain assignment by a building contractor of "whatever balance may be due me on" a certain contract up to the amount of $900, when at the time of the assignment $1,800 was due, was held not to be an assignment of "future earnings" under St. 1909, c. 514, §§ 125, 126, as amended by St. 1910, c. 563, in regard to the recording of assignments of future earnings, whether the last named statute was repealed by implication by St. 1911, c. 727, §§ 22, 25, or not. *Ibid.*

And it was held that no statute required that such an assignment should be recorded. *Ibid.*

ATTACHMENT.

A common law assignment for the benefit of creditors made in consideration of the release by the assignee, who was a creditor of the assignor and signed

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the instrument of assignment, and by other creditors, who assented in writing to the assignment, of their claims against the assignor, is valid against subsequent attachments made by creditors who did not assent to the assignment. *Cropper* v. *Gorham*, 119.

ATTORNEY AT LAW.

An attorney at law by his general employment in a certain matter is not given authority to make an executory contract in behalf of his client in the nature of a compromise of his client's demand. *Smith* v. *Abbott*, 326.

The mere employment of an attorney at law by the owner of a building to enforce the collection of rent due from a lessee or the ejectment of the lessee does not give to the attorney at law power to make with a general lessee of the building in behalf of his client and without the client's special consent an executory agreement to indemnify such general lessee against any loss he may suffer by reason of claims of sublessees under leases given by him. *Ibid.*

The language of a general power of attorney under seal was held not to confer upon the attorney power to delegate his power to an attorney at law in the absence of a special provision to that effect in its provisions or unless it appears from the nature of the agency that the parties contemplated that the employment of such agent would be necessary. *Ibid.*

Application of the foregoing principle, where it appeared that two owners of a building by separate instruments gave a general power of attorney to a certain person to manage the property for them, one instrument specifically conferring a power of delegation of authority, and the other omitting such a provision, and it was held that an attorney at law employed by the person appointed under the instruments did not derive from the powers of attorney any authority to make on behalf of the owners with a tenant an agreement of indemnity, and that such an agreement could not be enforced. *Ibid.*

At the argument of exceptions alleged by the defendant in an action of tort after a verdict for the plaintiff, where the question is whether there was any evidence on which the jury could find for the plaintiff on the issues of fact on which the rights of the parties depend, it is out of place for the counsel for the defendant in his argument to compare the number of witnesses who testified in favor of the defendant and the character of the testimony given by them with the number who testified for the plaintiff and the character of their testimony. *Gaffney* v. *Bay State Street Railway*, 457.

The advice of counsel to an executor that he is not required to bring in to the assessors of a town a list of taxable property of the estate of his testator under the provisions of St. 1909, c. 490, Part I, §§ 41, 49, is not as matter of law good cause for a failure of the executor to bring in such a list. *Sears* v. *Nahant*, 437.

Where, in an action against a street railway company for personal injuries, the counsel for the defendant assents to the introduction in evidence of a letter from its attorney containing an offer of settlement on the stipulation by the plaintiff's attorney that the letter might be explained, an exception afterwards cannot be taken by the plaintiff to evidence introduced by the defendant to explain that an offer was made upon the basis that the defendant was not responsible for the accident. *Sport, petitioner*, 453.

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AUTOMOBILE.

Operator's License.

It seems that the failure of the holder of a license to operate an automobile to disclose, in answer to a question calling for the disclosure of any physical incapacity or infirmity when he made his application to the highway commission for the license, the facts that his right leg had been amputated two or three inches above the knee and had been replaced by an artificial one and that his left leg was withered, does not affect the validity of his license in relation to other travellers on the highway, although it may be a ground for the revocation of the license by the highway commission. *O'Hare* v. *Gloag*, 24.

In the above case the person holding a license under such circumstances had a right to operate his automobile without a license because he had with him a licensed operator carrying his license, thus satisfying the requirement of St. 1909, c. 534, § 10. *Ibid.*

Negligent Operation.

See NEGLIGENCE, *In Use of Automobile.*

BAILMENT.

In an action on a special contract, against an agent to whom the plaintiff had entrusted merchandise to be sold upon a commission, for a balance alleged to be due, a refusal of the judge to rule that the defendant was a gratuitous bailee and consequently was not liable for the goods unless he was negligent in caring for them, was held to have been proper. *C. H. Eden Co.* v. *Henry Krey Co.* 62.

BALLOT.

See ELECTIONS.

BANKRUPTCY.

At common law (under St. 13 Eliz. c. 5) and apart from statutory provisions a preference of one creditor by paying or securing an honest debt to him to the exclusion of others is not unlawful or voidable by or in behalf of the other creditors, if the sole object of the payment or transfer is to pay or secure the debt. *Lyon* v. *Wallace*, 351.

Suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy on the ground that the transfer was in fraud of creditors at common law, where it was held that the findings of a justice who heard the case did not establish any secret trust in relation to the property transferred to the bankrupt's wife in part payment of a legacy due to her, and that the bill must be dismissed. *Ibid.*

In such suit the plaintiff was permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present

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transaction was in fraud of creditors, such evidence being admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors. *Lyon* v. *Wallace*, 351.

In such suit it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Ibid.*

On the facts in evidence in a suit in equity by a trustee in bankruptcy to avoid as an unlawful preference an assignment of a debt made by the plaintiff's bankrupt within four months before the filing of his voluntary petition in bankruptcy, it was held that it could not be found that the bankrupt was insolvent at the time he made the assignment, and therefore that no unlawful preference under the provisions of the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 11, was shown. *Jump* v. *Bernier*, 241.

Provisions of a trust created by a will under which it was held that the trustee in bankruptcy of one of the beneficiaries had no interest during the life of the bankrupt which he could enforce in equity. *Brown* v. *Lumbert*, 419.

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BILLS AND NOTES.

Validity.

In an action on a negotiable promissory note, where the defendant has introduced evidence that the note was obtained from him by duress of the payee who indorsed the note to the plaintiff, if this evidence is believed, the burden is on the plaintiff to prove that he was a holder in due course as defined in R. L. c. 73, § 69. *Phillips* v. *Eldridge*, 103.

If, after St. 1912, c. 675, § 5, amending the small loans act, went into effect, a person unlicensed under the act, in a transaction which was subject to its provisions, accepted a note in place of another note which was valid and was given to him before the act took effect, the note so received by him is void and he cannot maintain an action upon it. *Bennett* v. *Tremont Securities Co.* 218.

But in a proper action or suit he can recover the amount still due upon the debt for which he received the note. *Ibid.*

Holder in Due Course.

In an action on a negotiable promissory note, where the defendant has introduced evidence that the note was obtained from him by duress of the payee who indorsed the note to the plaintiff, if this evidence is believed, the burden is on the plaintiff to prove that he was a holder in due course as defined in R. L. c. 73, § 69. *Phillips* v. *Eldridge*, 103.

In such an action it was held to have been improper to order a verdict for the plaintiff although the plaintiff and the payee, called as adverse witnesses by the defendant, gave some evidence tending to show that the plaintiff was a holder in due course. *Ibid.*

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In the foregoing case a part of the testimony of the two witnesses, if it was believed without believing the rest of their testimony, would have warranted a finding that the plaintiff was not a holder in due course. *Phillips* v. *Eldridge*, 103.

Conditional Delivery.

Where notes were delivered with a letter, which was read by the person who received them and which stated, "I understand . . . that, of course, in the event of the deal not being completed the notes will be returned on demand," it was held that, when the transaction was not completed, the maker of the notes was entitled to have them returned to him by the vendors, who were not holders in due course, and might enforce that right by a suit in equity. *Cheney* v. *Taber*, 332.

Collateral Agreement.

An agreement to renew a promissory note is a collateral agreement and not an agreement that contradicts the note. *Keith* v. *Radway*, 515.

Declaration in an action for the enforcement of an agreement, which was collateral to a promissory note given by the plaintiff to the defendant in payment for certain bonds of a corporation controlled by the defendant and related to the principal and interest of the note being paid from proceeds of the bonds, was held to set forth a cause of action although it was not well drawn. *Ibid.*

BLACKLISTING.

See Boycott.

BOARD OF HEALTH.

State.

The provisions of R. L. c. 91, §§ 113, 114, relating to the prohibiting by the commissioners on fisheries and game of the taking of oysters, clams, quahaugs and scallops from certain defined areas of tidal water and flats upon receipt of a request to that effect from the State board of health, are a valid exercise of the police power of the General Court. *Commonwealth* v. *Feeney*, 323.

The provision of § 113 above described, that the order of the commissioners on fisheries and game shall prohibit the taking of such shell fish from such contaminated waters or flats "for such period of time as the State board of health may prescribe," does not require that the State board of health in its request nor the commissioners in their order shall state when the prohibition shall cease, but means only that the prohibition shall remain in force until the State board of health becomes satisfied that the contamination has ceased. *Ibid.*

Municipal.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

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BOND.

Of Executor or Administrator.

See appropriate subtitles under EXECUTOR AND ADMINISTRATOR.

Supersedeas Bond.

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Contakis* v. *Flavio*, 259.

BOSTON.

Apportionment of Cost of Building and Maintaining Certain Bridges.

Constitutionality of St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge. *Boston, petitioner*, 468.

It was within the power of the Legislature by St. 1913, c. 341, § 1, to authorize the commission appointed under St. 1911, c. 581, § 1, to apportion the cost of the construction of a certain bridge which then had not been built. *Ibid.*

The facts that, under the provisions of Sts. 1911, c. 581; 1913, c. 341, the entire management of the operation of Chelsea Bridge is vested in the city of Boston and that the commission to be appointed thereunder was given power to assess upon the city of Chelsea and the town of Revere a portion of the cost of such operation, while somewhat novel, do not make the statutes unconstitutional. *Ibid.*

The word "maintenance" in §§ 1, 3 of St. 1911, c. 581, relating to the apportionment by a commission to be appointed by the Supreme Judicial Court of the cost of construction, reconstruction, repairs and maintenance of certain bridges, includes "operation" and therefore it is within the power of such commission to apportion the cost of operating such bridges in accordance with the provisions of that statute and of St. 1913, c. 341. *Ibid.*

A steel conduit over filled land may constitute a part of a single bridge, another part of which spans the mouth of a navigable river; and therefore the finding of the above commission that Chelsea Bridge extends from the navy yard in Charlestown to Chelsea is warranted although the middle section consists of a steel viaduct built on masonry piers over railroad tracks constructed on filled land. *Ibid.*

The facts connected with certain negotiations between the cities of Boston and Chelsea looking toward the assumption by one or the other of the entire duty of maintenance and expense of the north draw of Chelsea Bridge, and the passage of certain statutes together with the payment by Chelsea to Boston of $25,000 and the fact that thereafter Boston repaired and maintained the draw at its sole expense up to the passage of St. 1911, c. 581, was

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held not to constitute a contract which "exists between the city of Boston and the city of Chelsea, which" under St. 1911, c. 581, § 5, "prevents the carrying out of this act in any part." *Boston, petitioner*, 468.

The fact that the city of Boston widened that draw from thirty-two to fifty feet in 1895, and in 1899 widened it further to sixty feet and, without raising any question as to an apportionment of the expense thereof, continued to pay the entire expense of construction, repair and maintenance up to the enactment of St. 1911, c. 581, does not affect the true interpretation of St. 1880, c. 159, as relating only to the draw as it existed in 1880. *Ibid.*

Liquor License Fees.

Under St. 1906, c. 291, § 4, the fees paid by licensees under R. L. c. 100, § 10, to the secretary of the licensing board of the city of Boston as the recording officer for recording each license must be paid into the city treasury. *Boston* v. *Epple*, 395.

BOSTON, CAPE COD AND NEW YORK CANAL COMPANY.

See Cape Cod Canal.

BOYCOTT.

A combination of manufacturers of a certain commodity to blacklist the striking employees of another manufacturer of the same commodity, when directed against persons with whom those combining have no trade dispute or when the concerted action coerces the members of the combination by implied threats or otherwise to withhold employment from those whom they otherwise would employ, is on the footing of a boycott and may be enjoined by a court of equity or may afford a ground for recovering damages in an action at law. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

It was held that a suit in equity against certain shoe manufacturers in a certain city, to enjoin them from blacklisting the plaintiff because he took part in a strike against another shoe manufacturer in the same city, could not be maintained, because for more than three months after the filing of the bill the plaintiff had been taking part in a strike against his employer conducted by unlawful means in which the plaintiff joined. *Ibid.*

Such employee must seek redress in an action at law for any damage that he suffered by reason of the blacklisting. *Ibid.*

BRIDGE.

It is within the constitutional power of the Legislature to impose upon one city or town a part of the expense of erecting or maintaining a bridge within the limits of another city or town. *Boston, petitioner*, 468.

Constitutionality of St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge. *Ibid.*

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of the construction of a certain bridge which then had not been built. *Boston, petitioner*, 468.

Findings and rulings of such commission were upheld. *Ibid.*

A steel conduit over filled land may constitute a part of a single bridge, another part of which spans the mouth of a navigable river; and therefore a finding that Chelsea Bridge extends from the navy yard in Charlestown to Chelsea is warranted although the middle section consists of a steel viaduct built on masonry piers over railroad tracks constructed on filled land. *Ibid.*

BROKER.

Where a broker is employed by the owner of certain real estate to procure a customer either to buy the property or to exchange other property therefor, and he finds a customer who enters into an agreement for an exchange of property with the owner and who is able, ready and willing to carry out the agreement, the broker has earned his commission by procuring the customer, although the landowner that employed him refuses to make the exchange. *Brilliant* v. *Samelas*, 302.

BURNING INSURED PROPERTY.

Evidence, admitted at the trial of an indictment under R. L. c. 215, § 2, for being an accessory before the fact to the felony of burning the defendant's factory to defraud certain insurance companies in violation of R. L. c. 208, § 10, that a month or two before the fire the defendant's brother called at a certain store and asked the proprietor "if he could let him have a number of dozen of cork stopples, at the same time holding out a cork which he held in his hand, said cork being the type ordinarily used in one half pint bottles," but that the proprietor had no corks of that size, was held to have been admitted improperly. *Commonwealth* v. *Derry*, 45.

At the same trial, evidence that in the month before the fire the defendant's brother bought at another store perhaps a dozen or two or three or four dozen "small corks for half pint or pint bottles" was held to have been admitted properly. *Ibid.*

CAPE COD CANAL.

Although, in St. 1899, c. 448, § 14, relating to the providing and maintaining of suitable ferries or bridges across the Cape Cod Canal by the Boston, Cape Cod and New York Canal Company at points designated by the county commissioners, no provision is made for plans or supervision of plans nor is authority conferred in terms upon any one to determine that the company shall provide and maintain any ferry, bridge or tunnel, the provisions of § 6 of the statute, that the company shall make such construction for crossing the canal as the joint boards of the public service commission and the harbor and land commission may order and under their supervision and subject to plans approved by them, must have been intended to be incorporated in § 14. *Bourne* v. *Joint Board of Commissioners*, 293.

It was within the power and authority of the joint boards of the public service commission and the harbor and land commission, acting under Sts. 1899,

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c. 448; 1910, c. 519, to order the Boston, Cape Cod and New York Canal Company to provide and maintain a temporary ferry at Station 181, and to approve plans for its construction. *Bourne* v. *Joint Board of Commissioners*, 293.

CAPITAL AND INCOME.

An accumulated surplus of undivided profits of a manufacturing corporation, which is distributed among its stockholders by means of a special dividend of $50 a share on shares of the par value of $100 each with the effect of diminishing substantially the present market value of the shares, is income and not capital. *Talbot* v. *Milliken*, 367.

CARRIER.

Of Goods.

Where the servant of the owner of a trunk delivered it to a driver in the employ of an express company and took from the driver a receipt containing a clause limiting the damage to be recovered in case of loss unless the value was declared at the time of shipment, and, upon the driver asking for the value, the servant requested him to obtain the information from the owner at his office, the fact that neither the owner of the trunk nor his servant read the receipt or knew of the limitation of damage until after the trunk was lost, was held not to affect the right of the express company to rely on the limitation of damage. *Boynton* v. *American Express Co.* 237.

Nor was that right affected by a failure of the driver to call at the owner's office for a declaration of value, because the driver was under no obligation to do this and did not agree to do it, and, if he had so agreed, had no authority to waive any portion of the contract. *Ibid.*

Of Passengers.

Action against an ocean going steamship company for causing the death of a passenger who, when the vessel lurched, was thrown overboard at a place where there was no guard chain nor rail. *Hanley* v. *Eastern Steamship Corp.* 125.

When on a railroad train the conduct and speech of one passenger toward another is such that violence is likely to result unless some action is taken to prevent it, and the railroad corporation has reasonable notice of the situation and has an opportunity to take measures to prevent the impending violence, it becomes the duty of the corporation to protect the threatened passenger and to see that no harm comes to him. *Isenberg* v. *New York, New Haven, & Hartford Railroad*, 182.

Actions for personal injuries or death of passengers caused by negligence of street railway, elevated railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CENSUS.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so

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that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

CERTIORARI.

Whether a petition for a writ of certiorari is the proper method of bringing to this court the legality of a refusal by the licensing board of Boston under R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, to grant an application for a license for the sale of intoxicating liquors, was not decided in this case, where the petition was dismissed upon its merits. *Adams* v. *Licensing Board of Boston*, 429.

Under the circumstances, a delay of more than seven months, in filing a petition for a writ of certiorari to quash unlawful proceedings by the city council of a city for taking in fee certain land of the petitioner for the purpose of widening a public way, was not considered a ground for refusing to issue the writ, although a delay of such duration ordinarily would have been decisive against the petitioner. *Excelsior Needle Co.* v. *City Council of Springfield*, 34.

CHELSEA.

Constitutionality of St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge. *Boston, petitioner*, 468.

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The facts that, under the provisions of Sts. 1911, c. 581; 1913, c. 341, the entire management of the operation of Chelsea Bridge is vested in the city of Boston and that the commission to be appointed thereunder was given power to assess upon the city of Chelsea and the town of Revere a portion of the cost of such operation, while somewhat novel, do not make the statutes unconstitutional. *Ibid.*

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entire duty of maintenance and expense of the north draw of Chelsea Bridge, and the passage of certain statutes together with the payment by Chelsea to Boston of $25,000 and the fact that thereafter Boston repaired and maintained the draw at its sole expense up to the passage of St. 1911, c. 581, were held not to constitute a contract which "exists between the city of Boston and the city of Chelsea, which" under § 5, "prevents the carrying out of this act in any part." *Boston, petitioner,* 468.

CHELSEA BRIDGE.

Constitutionality of the statutes empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge and the propriety of certain findings and rulings of that commission. *Boston, petitioner,* 468.

CHILD.

See PARENT AND CHILD.

CHIROPRACTIC.

One who calls himself a chiropractor and, without a license to practice medicine, is engaged in the practice of chiropractic, which "is the specific science that removes pressure upon the nerves by the adjustment of spinal vertebrae" by hand only without the use of instruments, may be found guilty of practicing medicine without a license within the meaning of R. L. c. 76, § 8. *Commonwealth* v. *Zimmerman,* 184.

The provisions of R. L. c. 76, § 9, excluding persons practicing certain methods of healing from the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered, does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws. *Ibid.*

The giving without legislative authority by an incorporated "college of chiropractic" of a certificate naming the holder as a "Doctor of Chiropractic" is punishable under R. L. c. 208, § 75, as granting a degree "without the authority of a special act of the General Court granting the power to give degrees." *Commonwealth* v. *New England College of Chiropractic,* 190.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

The provision of St. 1911, c. 624, relative to a review in the police, district or municipal court of the removal, lowering in rank or compensation, or suspension of certain persons "appointed to an office classified under the civil service rules of the Commonwealth," was held to apply clearly to the indefinite suspension by the commissioner of streets and highways of

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Lowell of a foreman of laborers in the street department of that city. *Gardner* v. *Lowell*, 150.

The reason assigned for the indefinite suspension of such a foreman, that the position held by him was not necessary and that in a more economical administration of the departments its duties could be transferred to others, is a "just cause" for removal or suspension within the contemplation of St. 1904, c. 314. *Ibid.*

Where a foreman suspended for this cause filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision. *Ibid.*

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

Acts of the commissioner of streets and highways of Lowell in keeping in the safe in his office a copy of the papers relating to the removal or suspension of a subordinate in his department, and in causing such papers temporarily to be removed to a police court for the purposes of the hearing of a petition of such subordinate for a review of the order for his removal or suspension were held to have been proper under the provision of the city charter and to have been not a violation of but a compliance with the requirement of St. 1904, c. 314, § 2, that in case of such a suspension or removal "a copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record." *Ibid.*

COLLEGE.

The giving without legislative authority by an incorporated "college of chiropractic" of a certificate naming the holder as a "Doctor of Chiropractic" is punishable under R. L. c. 208, § 75, as granting a degree "without the authority of a special act of the General Court granting the power to give degrees." *Commonwealth* v. *New England College of Chiropractic*, 190.

COMMISSIONERS ON FISHERIES AND GAME.

The provisions of R. L. c. 91, §§ 113, 114, relating to the prohibiting by the commissioners on fisheries and game of the taking of oysters, clams, quahaugs and scallops from certain defined areas of tidal water and flats upon receipt of a request to that effect from the State board of health, are a valid exercise of the police power of the General Court. *Commonwealth* v. *Feeney*, 323.

The provision of § 113 above described, that the order of the commissioners on fisheries and game shall prohibit the taking of such shell fish from such contaminated waters or flats "for such period of time as the State board of health may prescribe," does not require that the State board of health in its request nor the commissioners in their order shall state when the prohibition shall cease, but means only that the prohibition shall remain in force until the State board of health becomes satisfied that the contamination has ceased. *Ibid.*

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COMMON VICTUALLER.

One who is licensed as a common victualler under R. L. c. 102, §§ 1–22, has no right to sell any kind of food on the Lord's day to be taken and carried away, where such sale is not a work of necessity or charity, and, if he does so, he may be convicted and punished under R. L. c. 98, §§ 2, 3. *Commonwealth* v. *Meckel*, 70.

Assuming that a common victualler, although by R. L. c. 102, § 8, he is not required to keep his place of business open on the Lord's day, lawfully may do so for the purpose of supplying his customers with food to be eaten upon his premises, this gives him no right to sell on that day any food to be carried away. *Ibid.*

CONFLICT OF LAWS.

It was held not necessary to decide, where a certain testatrix at the time of the execution of her will was a resident of another State and at the time of her death was a resident of this Commonwealth and her will was proved here, by the law of which State the language of the will was to be interpreted, because in regard to the question to be passed upon the law of the two States was the same. *Goodrich* v. *Henderson*, 234.

CONSERVATOR.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, could not be exercised before the enactment of St. 1915, c. 23, by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Jones* v. *Maguire*, 315.

CONSTITUTIONAL LAW.

Police Power.

R. L. c. 76, § 8, providing penalties for practicing medicine within this Commonwealth without a license is constitutional. *Commonwealth* v. *Zimmerman*, 184.

The provisions of R. L. c. 76, § 9, excluding persons practicing certain methods of healing from the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered, does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws. *Ibid.*

The provisions of R. L. c. 91, §§ 113, 114, relating to the prohibiting by the commissioners on fisheries and game of the taking of oysters, clams, quahaugs and scallops from certain defined areas of tidal water and flats upon receipt of a request to that effect from the State board of health, are a valid exercise of the police power of the General Court. *Commonwealth* v. *Feeney*, 323.

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Apportionment of Cost of Building and Maintenance of Bridges.

It is within the constitutional power of the Legislature to impose upon one city or town a part of the expense of erecting or maintaining a bridge within the limits of another city or town. *Boston, petitioner*, 468.

It was within the power of the Legislature by St. 1913, c. 341, § 1, to authorize the commission appointed under St. 1911, c. 581, § 1, to apportion the cost of the construction of a certain bridge which then had not been built. *Ibid.*

The facts that, under the provisions of Sts. 1911, c. 581; 1913, c. 341, the entire management of the operation of Chelsea Bridge is vested in the city of Boston and that the commission to be appointed thereunder was given power to assess upon the city of Chelsea and the town of Revere a portion of the cost of such operation, while somewhat novel, do not make the statutes unconstitutional. *Ibid.*

Guardianship of Minors.

The Legislature has power to authorize the appointment, as guardian of an illegitimate child with custody of the child's person, of some one other than the child's mother, although the mother is living. *Chambers's Case*, 178.

Delegation of Legislative Powers to Judicial Department.

St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge and to assess upon any street railway having a location thereon a just and equitable share of the cost of construction and repairs, is constitutional, not being a delegation of legislative powers to the judicial department of the government. *Boston, petitioner*, 468.

Equal Protection of Laws.

The provision of R. L. c. 76, § 9, excluding persons practicing certain methods of healing from the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered, does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws. *Commonwealth* v. *Zimmerman*, 184.

CONTRACT.

What constitutes.

In an action for use and occupation of a fence upon land of the plaintiff for bill posting purposes, if there is no evidence as to any talk between the plaintiff and the defendant as to the use of the fence by the defendant, and if the evidence tends merely to show that the defendant made a contract for the use of the fence with a person who had no authority to make such a contract on the plaintiff's behalf, and that, as soon as the defendant was notified by the plaintiff that the plaintiff would claim compensation for the use of the fence, he ceased using it, a finding for the plaintiff is not warranted. *Stevenson* v. *Donnelly*, 161.

Where the servant of the owner of a trunk delivered it to a driver in the employ of an express company and took from the driver a receipt containing a

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clause limiting the damage to be recovered in case of loss unless the value was declared at the time of the shipment, and, upon the driver asking for the value, the servant requested him to obtain the information from the owner at his office, the fact that neither the owner of the trunk nor his servant read the receipt or knew of the limitation of damage until after the trunk was lost, was held not to affect the right of the express company to rely on the limitation of damage. *Boynton* v. *American Express Co.* 237.

Nor was that right affected by a failure of the driver to call at the owner's office for a declaration of value, because the driver was under no obligation to do this and did not agree to do it, and, if he had so agreed, had no authority to waive any portion of the contract. *Ibid.*

Where notes were delivered with a letter, which was read by the person who received them and which stated, "I understand . . . that, of course, in the event of the deal not being completed the notes will be returned on demand," it was held that, when the transaction was not completed, the maker of the notes was entitled to have them returned to him by the vendors, who were not holders in due course, and might enforce that right by a suit in equity. *Cheney* v. *Taber*, 332.

St. 1880, c. 159, was a governmental regulation of the north draw of Chelsea Bridge as it then existed, and its provisions were subject to modification or repeal according to the wisdom of the Legislature. St. 1911, c. 581, § 5, did not transform that regulation into a contract. *Boston, petitioner*, 468.

The facts connected with certain negotiations between the cities of Boston and Chelsea looking toward the assumption by one or the other of the entire duty of maintenance and expense of the north draw of Chelsea Bridge, and the passage of certain statutes together with the payment by Chelsea to Boston of $25,000 and the fact that thereafter Boston repaired and maintained the draw at its sole expense up to the passage of St. 1911, c. 581, were held not to constitute a contract which "exists between the city of Boston and the city of Chelsea, which" under § 5, "prevents the carrying out of this act in any part." *Ibid.*

An agreement by a railroad company, recited as one of the considerations for a deed of land to it by the proprietors of a manufacturing establishment and relating to the maintenance of a track upon a trestle, was held under the circumstances to be enforceable in an action against the railroad corporation for failing to keep the trestle in repair. *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548.

Validity.

If a contract of subscription to a scholarship contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," a guarantor of the contract, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract. *International Textbook Co.* v. *Martin*, 1.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry. *Sullivan* v. *Lloyd*, 108.

It is settled law that, where a contract to build a certain structure for an agreed

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compensation has been performed in full by the contractor, the fact that he has completed the work does not deprive him of the right to maintain seasonably a suit in equity to set aside the contract because he was induced to enter into it by fraudulent misrepresentations of the defendant or under mutual and material mistakes of fact and to recover the fair value of the labor and materials furnished by him to the defendant. *Winston* v. *Pittsfield*, 356.

Allegations of the bill in such a suit which were held not sufficient to show fraud or mutual mistake. *Ibid.*

Equity will not give relief by setting aside a contract on the ground of mistake, where, although the plaintiff made a miscalculation when he signed the contract, the terms of the instrument express correctly the exact intention of the defendant. *Ibid.*

Where a contract in writing between a contractor and a city for the construction of a reservoir provided for a certain deduction in case of delay in completion of the contract, it was held that the parties made a clear agreement that such amount should be treated as liquidated damages and not as a penalty or forfeiture. *Ibid.*

In such a suit an allegation in the bill that the defendant "has assessed" and deducted damages for moneys paid to engineers and inspectors and for pumping states no ground for relief, because, if such deduction was unauthorized, the remedy by an action at law is plain, efficient and exclusive. *Ibid.*

The provisions of a policy of fire insurance in the Massachusetts standard form, relating to the submission to arbitration of the question of the amount of loss suffered from a fire within the terms of the policy, are valid. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

Construction.

Where one in writing guarantees the payment of the price for a scholarship agreed by another person to be paid "in accordance with the terms of the within subscription," the contract of subscription is incorporated into the contract of guaranty. *International Textbook Co.* v. *Martin*, 1.

In a certain contract in writing between the proprietor of a correspondence school and a subscriber to a scholarship it was held that an agreement of the subscriber to pay a stipulated price for a scholarship by instalments was an independent promise. *Ibid.*

It also was held that, although the subscriber had refused to complete his course, the proprietor of the school was entitled to recover the amount of all unpaid instalments and was not limited to a recovery merely of the damages sustained by reason of the subscriber's breach of the contract. *Ibid.*

Proper basis for the computation of "net profits," where a person employed as the representative and selling agent of a manufacturing corporation was to receive as his compensation a certain sum of money a year and a percentage of the net profits. *Stein* v. *Strathmore Worsted Mills*, 86.

Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, was a tenant or licensee, was not passed upon. *Stevenson* v. *Donnelly*, 161.

The mere use of the word "let" in an agreement granting a right or privilege to occupy a roof for bill posting purposes does not make the agreement a

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lease nor create the relation of landlord and tenant between the parties to the agreement. *Jones* v. *Donnelly*, 213.

A certain agreement by the owner of a building "to let to" a certain bill poster "the location of roof" on the building was held not to create a relation of landlord and tenant between the owner and the bill poster, but to be merely a contract concerning a permit or license for the use of the roof. *Ibid.*

Therefore, after use of the premises by the bill poster, neither the owner nor one to whom he conveys his rights in the premises can maintain against the bill poster by reason of the agreement an action for use and occupation of the premises. *Ibid.*

In an action by a shoe salesman against his employer for commissions alleged to be due to him under an agreement for employment during a certain year, where the plaintiff claimed commissions for sales made during the year of goods, which the defendant did not deliver until after his employment had ceased, and introduced in evidence a custom of the trade supporting his claim, and the defendant contended that, because of arrangements and contracts made between the parties in previous years, the custom did not apply, it was held that the questions in dispute were questions of fact for the jury. *Tapley* v. *Thayer-Osborne Shoe Co.* 166.

And, it appearing that the questions under correct instructions had been left to the jury, who found for the plaintiff, an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled. *Ibid.*

Where a contract in writing between a contractor and a city for the construction of a reservoir provided for a certain deduction in case of delay in completion of the contract, it was held that the parties made a clear agreement that such amount should be treated as liquidated damages and not as a penalty or forfeiture. *Winston* v. *Pittsfield*, 356.

Construction of a contract by the proprietor of a paper mill, who theretofore had been engaged in manufacturing large sheets of tissue which he sold to manufacturers who reduced the tissue to the size and condition in which it was sold to dealers as "toilet" paper, to furnish to a customer the entire product of his mill "finished in tissue toilet paper, rolls and packages, made and put up in such regular standard marketable shapes and sizes." *Fillmore* v. *Johnson*, 406.

It was held in the above case that a five per cent, which was to be added to a certain price stated, was intended as the millowner's profit or compensation for doing work of a kind not theretofore undertaken by him. *Ibid.*

Also that the "actual cost of finishing" included a shrinkage in weight of the tissue paper, the rent of premises used in finishing the paper, charges for insurance, for depreciation of the part of the plant and machinery used for finishing and for the personal services of a superintendent and bookkeeper. *Ibid.*

And that the items making up the cost were substantially the same as those that would be deducted from gross receipts in ascertaining net profits. *Ibid.*

In an action of contract for the price of certain merchandise furnished by the plaintiff under a contract in writing, where by the terms of the contract the agreed price for cash shipments was to be due thirty days thereafter, it seems, that the plaintiff, if entitled to recover, can recover interest com-

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puted on the amount due for each shipment from the expiration of such thirty days without showing any demand for payment. *Fillmore* v. *Johnson*, 406.

An agreement by a railroad company, recited as one of the considerations for a deed of land to it by the proprietors of a manufacturing establishment and relating to the maintenance of a track upon a trestle, was held under the circumstances to be enforceable, in an action against the railroad corporation for failing to keep the trestle in repair. *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548.

Meaning of the word "maintain" in such agreement. *Ibid.*

The words "any time" in an offer by the president and general superintendent of a corporation to certain purchasers of preferred and common shares of the capital stock of the corporation, "any time you feel real worried, why come out and you can get your money to the value you paid for the stock from me," were held to mean within a reasonable time, and under the circumstances an attempted acceptance of the offer after an interval of five months was held to have been too late as matter of law. *Starkweather* v. *Gleason*, 552.

Construction of leases of real estate, see LANDLORD AND TENANT, *Construction of Lease.*

Performance and Breach.

In a certain contract in writing between the proprietor of a correspondence school and a subscriber to a scholarship, it was held that an agreement of the subscriber to pay a stipulated price for a scholarship by instalments was an independent promise and that, although the subscriber had refused to complete his course, the proprietor of the school was entitled to recover the amount of all unpaid instalments and was not limited to a recovery merely of the damages sustained by reason of the subscriber's breach of the contract. *International Textbook Co.* v. *Martin*, 1.

In an action by a shoe salesman against his employer for commissions alleged to be due to him under an agreement for employment during a certain year, where the plaintiff claimed commissions for sales made during the year of goods, which the defendant did not deliver until after his employment had ceased, and introduced in evidence a custom of the trade supporting his claim and the defendant contended that, because of arrangements and contracts made between the parties in previous years, the custom did not apply, it was held that the questions in dispute were questions of fact for the jury. *Tapley* v. *Thayer-Osborne Shoe Co.* 166.

And, it appearing that the questions under correct instructions had been left to the jury, who found for the plaintiff, an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled. *Ibid.*

Where, at the trial of an action against a manufacturer for the alleged breach of a contract to employ the plaintiff for a year, it appeared that the only question was whether the action was brought before the contract was broken, the defendant was held not to be entitled to a ruling that there was no breach of the contract at the time the action was brought. *Marshall* v. *Columbia Manuf. Co.* 176.

In an action on a special contract, against an agent to whom the plaintiff had

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entrusted merchandise to be sold upon a commission, for a balance alleged to be due, a refusal of the judge to rule that the defendant was a gratuitous bailee and consequently was not liable for the goods unless he was negligent in caring for them, was held to have been proper. *C. H. Eden Co.* v. *Henry Krey Co.* 62.

In suits in equity to enforce the specific performance of contracts to purchase real estate, the rule in equity is applicable that the time of performance is not of the essence of the contract unless it has been made so by the parties. *Mansfield* v. *Wiles*, 75.

In such a suit in equity, where the contract sought to be enforced stated no time for performance and where it appeared that both parties caused delays beyond a time agreed upon after making the contract as a day of performance, it was held that the case came within the rule in equity that time was not of the essence of such a contract where it had not been made so by the parties and that the plaintiff was entitled to a decree for specific performance. *Ibid.*

The right of a vendor to enforce in equity the specific performance of a contract to purchase certain real estate is not lost by the existence of a small incumbrance upon the property which is immaterial to the purchaser. *Ibid.*

An incumbrance, consisting of a strip of land taken from the locus for a Sate highway but never used, was held to be so small and immaterial that it did not deprive the plaintiff of his right to a decree for specific performance, although the defendant was entitled to a deduction as compensation for the damage, if any, which had been done to the property by the taking. *Ibid.*

Where a contract in writing for support is stated therein to be made in consideration of mortgages of certain real estate securing non-negotiable promissory notes for an amount named, and the contract, mortgages and notes constitute one transaction, retention of possession by the mortgagor of the mortgage notes and a refusal by him to pay interest, were held to prevent him from maintaining an action for a breach of the contract to support him. *Bryne* v. *Dorey*, 399.

In an action brought by a millowner against his customer on a contract for furnishing to the defendant the entire product of the plaintiff's mill, it was held that a certain letter sent by the plaintiff to the defendant when they were at issue as to the actual cost of finishing, in which, because of the position taken by the defendant, the plaintiff said, "we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the meantime try and take care of your orders," did not estop the plaintiff from claiming damages from the defendant for not taking paper after its date, it appearing that the plaintiff was right as to the price insisted upon by him. *Fillmore* v. *Johnson*, 406.

Under the provisions of a policy of fire insurance in the Massachusetts standard form, while a reference to arbitrators of the question of the amount of loss, as therein provided for in case the parties are unable to agree, is a condition precedent to a right of action upon the policy, the return of an award or the making of a valid award is not such a condition precedent. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

If after an award by arbitrators under the provisions of a policy of fire insurance in the Massachusetts standard form, which under the circumstances is invalid as a matter of law, the insured offers to proceed with a

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new arbitration but the insurer refuses to join therein and insists upon the validity of the award already made, the insured need not resort to a suit in equity for an adjudication of the invalidity of the award, but has an adequate remedy at law in an action upon the policy. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

In such an action he may prove the invalidity of the award and may recover the amount justly due him under the provisions of the policy; and the insurer, if he contends that the award is valid, may offer it in defence to the action. *Ibid.*

The words "any time" in an offer by the president and general superintendent of a corporation to certain purchasers of preferred and common shares of the capital stock of the corporation, "any time you feel real worried, why come out and you can get your money to the value you paid for the stock from me," were held to mean within a reasonable time, and under the circumstances an attempted acceptance of the offer after an interval of five months was held to have been too late as matter of law. *Starkweather* v. *Gleason*, 552.

In an action for the price of lumber sold and delivered under a contract containing a provision that "all agreements are contingent upon strikes, accidents, delays of carriers and other delays beyond our control," a claim by the defendant of damages in recoupment by reason of the plaintiff's alleged failure to perform his contract in regard to the time of delivering the lumber was held not to have been sustained because a delay in delivery was occasioned solely by carriers other than the carrier by which the final shipments by the plaintiff to the defendant were made and were due to causes beyond the control of the plaintiff. *Durden-Coleman Lumber Co.* v. *William H. Wood Lumber Co.* 564.

In an action for the breach of a contract in writing by the defendant's failure to accept toy cannon manufactured and sold by the plaintiff to the defendant under an exclusive license to the plaintiff from the patentee of the toy, where there was no agreement by the plaintiff to guard against infringements of the patent, a claim of damages in recoupment based on a contention that a third person had infringed the patent under which the plaintiff was operating was held not sustained in law or fact. *American Toy Manuf. Co.* v. *McLoughlin*, 567.

Assignment.

A right of action to recover damages for the breach of a contract for support is assignable and R. L. c. 173, § 4, gives the assignee the right to sue on the contract in his own name. *Bryne* v. *Dorey*, 399.

In Writing.

If a contract of subscription to a scholarship contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," a guarantor of the contract, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract. *International Textbook Co.* v. *Martin*, 1.

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In an action by the assignee of an insolvent debtor under a common law assignment in writing clearly stated to be for the benefit of creditors to collect a debt admitted to be due to such debtor, testimony of the insolvent assignor that he understood the assignment to be for the benefit of some of his creditors and not for the benefit of all of them cannot affect the construction of the instrument of assignment. *Cropper* v. *Gorham*, 119.

An agreement to renew a promissory note is a collateral agreement and not an agreement that contradicts the note. *Keith* v. *Radway*, 515.

Implied.

To recover in an action for the use and occupation of real estate the plaintiff must prove that the relation of landlord and tenant existed between him and the defendant. *Jones* v. *Donnelly*, 213.

A certain agreement by the owner of a building "to let to" a certain bill poster "the location of roof" on the building was held not to create a relation of landlord and tenant between the owner and the bill poster, but to be merely a contract concerning a permit or license for the use of the roof; therefore, after use of the premises by the bill poster, neither the owner nor one to whom he conveys his rights in the premises can maintain against the bill poster by reason of the agreement an action for use and occupation of the premises. *Ibid.*

Although after St. 1912, c. 675, § 5, amending the small loans act, went into effect, a person unlicensed under the act, in a transaction which was subject to its provisions, accepted a note in place of another note which was valid and was given to him before the act took effect, the note so received by him is void and he cannot maintain an action upon it, yet in a proper action or suit he can recover the amount still due upon the debt for which he received the note. *Bennett* v. *Tremont Securities Co.* 218.

Statutory Action for Double the Value of Half of Fence.

See Fence and Fence Viewers.

Contract limiting Liability.

Where the servant of the owner of a trunk delivered it to a driver in the employ of an express company and took from the driver a receipt containing a clause limiting the damage to be recovered in case of loss unless the value was declared at the time of the shipment, and, upon the driver asking for the value, the servant requested him to obtain the information from the owner at his office, the fact that neither the owner of the trunk nor his servant read the receipt or knew of the limitation of damage until after the trunk was lost, was held not to affect the right of the express company to rely on the limitation of damage. *Boynton* v. *American Express Co.* 237.

Nor was the right affected by a failure of the driver to call at the owner's office for a declaration of value, because the driver was under no obligation to do this and did not agree to do it, and, if he had so agreed, had no authority to waive any portion of the contract. *Ibid.*

Driver of an express team was held to have no authority to waive a limitation of liability in a receipt for a trunk. *Ibid.*

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Of Guaranty.

See GUARANTY.

Agreement Collateral to a Promissory Note.

An agreement to renew a promissory note is a collateral agreement and not an agreement that contradicts the note. *Keith* v. *Radway*, 515.

Declaration in an action for the enforcement of an agreement, which was collateral to a promissory note given by the plaintiff to the defendant in payment for certain bonds of a corporation controlled by the defendant and related to the principal and interest of the note being paid from proceeds of the bonds, was held to set forth a cause of action although it was not well drawn. *Ibid.*

Building Contract.

Where a contract in writing between a contractor and a city for the construction of a reservoir provided for a certain deduction in case of delay in completion of the contract, it was held that the parties made a clear agreement that such amount should be treated as liquidated damages and not as a penalty or forfeiture. *Winston* v. *Pittsfield*, 356.

It is settled law that, where a contract to build a certain structure for an agreed compensation has been performed in full by the contractor, the fact that he has completed the work does not deprive him of the right to maintain seasonably a suit in equity to set aside the contract because he was induced to enter into it by fraudulent misrepresentations of the defendant or under mutual and material mistakes of fact and to recover the fair value of the labor and materials furnished by him to the defendant. *Ibid.*

Allegations of the bill in such a suit which were held not sufficient to show fraud or mutual mistake. *Ibid.*

In such a suit an allegation in the bill that the defendant "has assessed" and deducted damages for moneys paid to engineers and inspectors and for pumping states no ground for relief, because, if such deduction was unauthorized, the remedy by an action at law is plain, efficient and exclusive. *Ibid.*

For Share of Net Profits.

Proper basis for the computation of "net profits," where a person employed as the representative and selling agent of a manufacturing corporation was to receive as his compensation a certain sum of money a year and a percentage of the net profits. *Stein* v. *Strathmore Worsted Mills*, 86.

Where, in such computation, a valuation of the buildings, machinery and like physical property of the corporation at the end of the year must be made, there must be an allowance for depreciation during the year. *Ibid.*

In the absence of any definite evidence to the contrary, it cannot be said as a matter of law that a computation of the depreciation during a certain year of the buildings, machinery and other like physical property of a corporation manufacturing textile products by taking the book value of the plant, representing its cost value, and adding to it the actual expenditures for new construction and deducting six per cent upon that total, is wrong. *Ibid.*

In computing the net profits during a certain year of a corporation manufactur-

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ing textile products, it is right to allow as expenses the amounts actually expended for repairs and maintenance of the plant, this being a separate matter from the allowance made for depreciation. *Stein* v. *Strathmore Worsted Mills*, 86.

Finding of a master in the exercise of his discretion that a witness is qualified to express an opinion as to the ratio of such depreciation was held on the evidence not to have been improper. *Ibid.*

In such a suit, where it appeared that the defendant in making an allowance for depreciation had adopted the method commonly prevailing in its kind of business of deducting a percentage and thus deducted six per cent from the cost value of the plant, which a master found was a reasonable allowance for depreciation, it was held, that the burden was on the plaintiff to show that six was a wrong percentage to deduct, and that the finding of the master on this point, being warranted by the evidence, could not be pronounced erroneous. *Ibid.*

In a suit in equity to enforce such a contract, where the parties agreed to consider the business for the year by itself, the defendant cannot be allowed to deduct losses from bad debts incurred from business done before the beginning of the plaintiff's contract, and the defendant, if necessary, must change its usual methods of bookkeeping, in order to ascertain the "net profits" accruing to the defendant's business during the period of the plaintiff's employment. *Ibid.*

For Use of Premises for Bill Posting.

In an action for use and occupation of a fence upon land of the plaintiff for bill posting purposes, if there is no evidence as to any talk between the plaintiff and the defendant as to the use of the fence by the defendant, and if the evidence tends merely to show that the defendant made a contract for the use of the fence with a person who had no authority to make such a contract on the plaintiff's behalf, and that, as soon as the defendant was notified by the plaintiff that the plaintiff would claim compensation for the use of the fence, he ceased using it, a finding for the plaintiff is not warranted. *Stevenson* v. *Donnelly*, 161.

Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, was a tenant or licensee, was not passed upon. *Ibid.*

A certain agreement by the owner of a building "to let to" a certain bill poster "the location of roof" on the building was held not to create a relation of landlord and tenant between the owner and the bill poster, but to be merely a contract concerning a permit or license for the use of the roof. *Jones* v. *Donnelly*, 213.

Therefore, after use of the premises by the bill poster, neither the owner nor one to whom he conveys his rights in the premises can maintain against the bill poster by reason of the agreement an action for use and occupation of the premises. *Ibid.*

To marry.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry. *Sullivan* v. *Lloyd*, 108.

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Claim of suspended Workman against City for Wages.

Where a workman in the employ of a city, suspended for a "just cause" under St. 1904, c. 314, filed a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner, the workman, having elected to accept the relief afforded by that statute, is bound by the decision. *Gardner* v. *Lowell*, 150.

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

Equitable Defence to Action of Contract.

The defence of recoupment of damages in an action of contract is an equitable one and does not depend on the rules relating to set-off. *Bryne* v. *Dorey*, 399.

Where therefore such a defence is alleged in the answer of two defendants their rights in equity as well as at law may be considered. *Ibid.*

Accordingly, where a husband and wife were sued jointly, it was held, that overdue and unpaid notes, which had been made by the plaintiff and had been given by him to both defendants, although made payable to the wife only, as a part of the transaction on which the plaintiff's claim was founded, could be deducted in recoupment from the plaintiff's claim or, if in excess of that claim, could be used to extinguish it, no superior rights of third persons against either of the defendants having intervened. *Ibid.*

CORPORATION.

By-laws.

A certain by-law of a foreign corporation, whose place of business is in this Commonwealth, whose officers reside here and whose books and records are kept here, providing in substance that stockholders should have a right to inspect the corporation's books and records only when and as the directors should determine, where no provision of the general law of the State of incorporation or of the charter of the corporation authorized it, was held to be invalid. *Klotz* v. *Pan-American Match Co.* 38.

In holding such by-law invalid, it was said that undoubtedly a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders. *Ibid.*

Stockholder's Right to inspect Books and Records.

The common law right of a stockholder in a corporation to inspect the books and records of the corporation at seasonable times and for proper purposes is well established *Klotz* v. *Pan-American Match Co.* 38.

But the right is a qualified and not an absolute one, and the issuing of a writ of mandamus for its enforcement is discretionary. *Ibid.*

The statutory right to inspect the books and records of corporations given to stockholders by St. 1903, c. 437, § 30, here was assumed to be applicable only to domestic corporations. *Ibid.*

The remedy of a stockholder in a foreign corporation having its usual place of

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business in this Commonwealth, who has been deprived of his common law privilege of examining the books and records of the corporation, is a writ of mandamus. *Klotz* v. *Pan-American Match Co.* 38.

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Liability of Directors.

Certain essential allegations which were held not to appear in a bill in equity by a stockholder in a corporation, alleged to be brought in behalf of himself and all other stockholders who desired to join, to compel the enforcement by the corporation of the liabilities to it of some of its present and former directors by reason of alleged negligence and misconduct in the management of the affairs of the corporation whereby great losses had been incurred. *Bartlett* v. *New York, New Haven, & Hartford Railroad,* 530.

Dividend.

An accumulated surplus of undivided profits of a manufacturing corporation, which is distributed among its stockholders by means of a special dividend of $50 a share on shares of the par value of $100 each with the effect of diminishing substantially the present market value of the shares, is income and not capital. *Talbot* v. *Milliken,* 367.

Foreign.

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But the right is a qualified and not an absolute one, and the issuing of a writ of mandamus for its enforcement is discretionary. *Ibid.*

The remedy of a stockholder in a foreign corporation having its usual place of business in this Commonwealth, who has been deprived of his common law privilege of examining the books and records of the corporation, is a writ of mandamus. *Ibid.*

A certain by-law of a foreign corporation, whose place of business is in this Commonwealth, whose officers reside here and whose books and records are kept here, providing in substance that stockholders should have a right to inspect the corporation's books and records only when and as the directors should determine, where no provision of the general law of the State of incorporation or of the charter of the corporation authorized it, was held to be invalid. *Ibid.*

In holding such by-law invalid, it was said that undoubtedly a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders. *Ibid.*

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CUSTOM.

In an action by a shoe salesman against his employer for commissions alleged to be due to him under an agreement for employment during a certain year, where the plaintiff claimed commissions for sales made during the year of goods, which the defendant did not deliver until after his employment had ceased, and introduced in evidence a custom of the trade supporting his claim and the defendant contended that, because of arrangements and contracts made between the parties in previous years, the custom did not apply, it was held that the questions in dispute were questions of fact for the jury. *Tapley* v. *Thayer-Osborne Shoe Co.* 166.

And, it appearing that the questions under correct instructions had been left to the jury, who found for the plaintiff, an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled. *Ibid.*

At the trial of an action of tort by an administrator against a street railway company for causing the death of a workman in a wide street in a city, evidence as to a practice of the defendant of running its cars slowly and of striking the gong continuously while passing through an area where repairs were being made was admissible, not only to show how the cars were run, but also to show that the intestate knew of the usual method and presumably governed his conduct accordingly. *McCue* v. *Boston Elevated Railway*, 432.

DAMAGES.

For Property taken or impaired under Statutory Authority.

Under the circumstances, a loss of view from certain land occasioned by the abolition of a certain crossing of a railroad with a highway at grade was held to be a damage too remote and speculative and not sufficiently distinct, separate, special and peculiar to warrant a recovery therefor under St. 1906, c. 463, Part I, § 37. *Howell* v. *New York, New Haven, & Hartford Railroad*, 169.

Whether under any circumstances there could be a recovery under that statute for loss of view, was not decided. *Ibid.*

For Breach of Contract.

In a certain contract in writing between the proprietor of a correspondence school and a subscriber to a scholarship, it was held that an agreement of the subscriber to pay a stipulated price for a scholarship by instalments was an independent promise and that, although the subscriber had refused to complete his course, the proprietor of the school was entitled to recover the amount of all unpaid instalments and was not limited to a recovery merely of the damages sustained by reason of the subscriber's breach of the contract. *International Textbook Co.* v. *Martin*, 1.

In Tort.

In an action at common law for personal injuries sustained by reason of the wilful and reckless misconduct of the defendant in setting his dog on the

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plaintiff when he was a trespasser on the defendant's premises, the plaintiff on obtaining a verdict is not entitled to recover double damages under R. L. c. 102, § 146, on the ground that his injuries were caused by the bite of the defendant's dog. *Zink* v. *Foss*, 73.

And where, in such action, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no question for a new trial. *Ibid.*

Where an error at the trial of an action of tort for personal injuries, in which the plaintiff obtained a verdict, consisted only of the admission of certain incompetent evidence introduced by the plaintiff upon the question of damages, this court in sustaining exceptions alleged by the defendant ordered that the new trial should be confined to that issue. *Mahoney* v. *Boston Elevated Railway*, 116.

Where, at the trial of an action by a tailor for personal injuries the plaintiff had introduced without objection evidence tending to show his physical inability to do his usual work consequent upon his injuries, it was held to have been error for the presiding judge thereafter, against the defendant's exception, to permit the plaintiff to show that the profits of his business for the six months before the accident were $1,200 and that for the corresponding period after the accident they were only $500. *Ibid.*

In an action by a workman in a shoe factory against a corporation doing a retail clothing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an asssigmnent of wages alleged to have been executed by the plaintiff to the defendant, it was held that testimony as to the average wages of those employed in the shop of the plaintiff's employer in the same work in which the plaintiff was employed was competent as tending to show the rate of compensation to which the plaintiff might have attained but for his discharge, there being other evidence that the plaintiff at the time of his discharge was receiving almost as much as such average. *Kennedy* v. *Hub Manuf. Co.* 136.

Special.

Remarks as to a possible basis for a denial of a claim of the defendant, in an action to recover the price of lumber sold and delivered by the plaintiff, for special damages in recoupment on the ground that by reason of delays in the deliveries of the shipments of the lumber a third person to whom the defendant had resold the lumber had suffered loss in consequence of the delay. *Durden-Coleman Lumber Co.* v. *William H. Wood Lumber Co.* 564.

In Recoupment.

The defence of recoupment of damages in an action of contract is an equitable one and does not depend on the rules relating to set-off. *Bryne* v. *Dorey*, 399.

Where therefore such a defence is alleged in an answer of two defendants their rights in equity as well as at law may be considered. *Ibid.*

Accordingly, where a husband and wife were sued jointly, it was held, that overdue and unpaid notes, which had been made by the plaintiff and had

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been given by him to both defendants, although made payable to the wife only, as a part of the transaction on which the plaintiff's claim was founded, could be deducted in recoupment from the plaintiff's claim or, if in excess of that claim, could be used to extinguish it, no superior rights of third persons against either of the defendants having intervened. *Bryne* v. *Dorey*, 399.

In an action for the price of lumber sold and delivered under a contract containing a provision that "all agreements are contingent upon strikes, accidents, delays of carriers and other delays beyond our control," a claim by the defendant of damages in recoupment by reason of the plaintiff's alleged failure to perform his contract in regard to the time of delivering the lumber was held not to have been sustained because a delay in delivering was occasioned solely by carriers other than the carrier by which the final shipments by the plaintiff to the defendant were made and were due to causes beyond the control of the plaintiff. *Durden-Coleman Lumber Co.* v. *William H. Wood Lumber Co.* 564.

In an action for the breach of a contract in writing by the defendant's failure to accept toy cannon manufactured and sold by the plaintiff to the defendant under an exclusive license to the plaintiff from the patentee of the toy, where there was no agreement by the plaintiff to guard against infringements of the patent, a claim of damages in recoupment based on a contention that a third person had infringed the patent under which the plaintiff was operating, was held not sustained in law or fact. *American Toy Manuf. Co.* v. *McLoughlin*, 567.

Liquidated.

Where a contract in writing between a contractor and a city for the construction of a reservoir provided for a certain deduction in case of delay in completion of the contract, it was held that the parties made a clear agreement that such amount should be treated as liquidated damages and not as a penalty or forfeiture. *Winston* v. *Pittsfield*, 356.

DEATH.

Actions for death by wrongful act, see NEGLIGENCE, *Causing death.*
Evidence of nature of death, see appropriate subtitle under EVIDENCE.

DEDICATION.

A dedication of land to the use of the public for a park or pleasure ground need not be in writing and may be shown by oral statements of the landowner or of those authorized to act in his behalf, or by acts of the landowner from which his intention can be inferred. *Attorney General* v. *Onset Bay Grove Association*, 342.

On the findings contained in a master's report it was held, that there was evidence that a corporation, whose purposes were to provide a place for holding camp, grove and other meetings of a social and religious character and to create and establish a popular summer resort, by its acts and declarations had dedicated the use of certain lands to the public and of ample evidence of acceptance by the public. *Ibid.*

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DEED.

Delivery.

It was held that a mortgage of real estate properly was delivered although certain of the mortgagees did not know until long after the mortgage was made that it had been taken in their behalf, if the beneficial owner of the property, who was one of the two trustees that were named as mortgagees, had authority to act to accept the mortgage both as trustee and as the agent of the other mortgagees and accepted it for all. *Hanson* v. *Griswold*, 228.

Construction.

Where a description of land in a deed, after defining the land clearly by metes and bounds, concludes with the phrases "or however otherwise bounded, measured or described" and "be all said above measurements more or less," if no reference is made in the deed to any previous conveyance or source of title, these words are not equivalent to a general description and give the grantee no right to any land outside the parcel included in the particular description. *Pollard* v. *Ketterer*, 317.

An agreement by a railroad company, recited as one of the considerations for a deed of land to it by the proprietors of a manufacturing establishment and relating to the maintenance of a track upon a trestle, was held under the circumstances to be enforceable in an action against the railroad corporation for failing to keep the trestle in repair. *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548.

Meaning of the word "maintain" in such agreement. *Ibid.*

Correction of Mistake.

It was held that an alleged mistake, in including a strip of land in a deed which was not intended to be conveyed, could not be corrected in defence to a writ of entry brought by the grantee of the added strip of land to assert his title, unless under R. L. c. 173, § 28, the grantee of the diminished lot could be allowed to set up a mutual mistake of fact as an equitable defence, a question which was not raised in this case. *Pollard* v. *Ketterer*, 317.

In the case above stated, it was said, that another question that was not raised was whether the tenant could obtain relief in a suit in equity to reform the deeds. *Ibid.*

DEPOSITION.

See that subtitle under PRACTICE, CIVIL.

DEVISE AND LEGACY.

Vested Interest.

Where the language of a will does not make it clear whether a certain remainder is vested or contingent, the remainder will be deemed to be vested unless such construction would result in a disposition of the property inconsistent with the testator's intention. *Whitman* v. *Huefner*, 265.

Where property is given in remainder by the provisions of a will, whose lan-

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guage does not clearly state whether the remainder is vested or contingent, to children or other descendents of the testator, that circumstance tends to indicate that vested rather than contingent remainders were intended. *Whitman* v. *Huefner*, 265.

Upon the construction of the language of a will which gave the residue of the testator's estate to trustees in trust to pay the income to his wife for life, with power to pay to her out of the principal such amount as should meet the requirements of her suitable maintenance and the care and education of his minor children, and, upon the decease of the widow, to pay over to his children and to the issue of any deceased child by right of representation all of said trust fund then remaining, it was held that by the established rules of construction the interest of the children of the testator vested at his death. *Ibid.*

It also was held that the mere fact that the trustees were authorized to expend principal during the widow's life and thus to decrease the size of a remainderman's share did not establish an intention to postpone the vesting until the widow's death. *Ibid.*

Residue Clause.

Where the residue clause of a will gave the residue of the testator's property "divided into seven equal parts . . . one share each" to seven persons specifically named and one of these seven died before the testator without issue surviving it was held, that a provision of the clause preceding, which followed definite legacies and was to the effect that, in "the event of the lapse of any one of these legacies by the death of a legatee, I wish the lapsed legacy to be equally divided between the other members of that branch of the family to which this belonged," could not be read into the residue clause, and that therefore there was an intestacy as to one seventh of the residuary estate. *Aiken* v. *Comstock*, 444.

Clause as to Payment of Succession Tax.

Where a clause in a will by which the testator exercised a certain power of appointment, given to him by the will of his mother, was followed by a clause expressing the testator's wish that "all the legacies hereinbefore given to be paid in full to the various legatees without deduction for legacy taxes and succession dues," it was held under the circumstances that the word "legacies" was not intended to include appointments, and that the succession taxes payable to the Commonwealth on the transfers made under the appointment were payable out of the fund appointed and not out of the residue of the estate of the testator. *Loring* v. *Gardner*, 571.

Missing Words.

It was held that words missing from an incomplete sentence in a will providing for a trust could not be supplied by conjecture, but that the words must be construed as they stood. *Clarke* v. *Rathbone*, 574.

In this case it was held that their meaning was that certain income was given to the children of the testator named as a class, and that upon the death of one of them the income was to be paid to the survivors until, upon the death of all but one, the whole income was to be paid to the last survivor until his or her death. *Ibid.*

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Legacy Subject to a Charge.

Where a testatrix provided by her will that from the income of the residue of her property there should be paid $300 a year to her two aunts and the survivor of them, and then provided that her husband during his life might use the principal for any purpose which he might deem expedient, it was held that until the death of both aunts the husband of the testatrix could not exercise his power of spending and consuming the principal to such an extent that the remaining principal would not produce $300 a year; but that, subject to this charge, he had the right during his lifetime of spending and consuming the principal for any purpose which he in good faith deemed expedient. *Goodrich* v. *Henderson*, 234.

Lapsed Legacy and Intestacy.

Where the residue clause of a will gave the residue of the testator's property "divided into seven equal parts . . . one share each" to seven persons specifically named and one of these seven died before the testator without issue surviving, it was held that a provision of the clause preceding, which followed definite legacies and was to the effect that, in "the event of the lapse of any one of these legacies by the death of a legatee, I wish the lapsed legacy to be equally divided between the other members of that branch of the family to which this belonged," could not be read into the residue clause, and that therefore there was an intestacy as to one seventh of the residuary estate. *Aiken* v. *Comstock*, 444.

Trusts.

Construction of provisions in wills as to trusts, see TRUST, *Construction*.

Conflict of Laws.

It was held not necessary to decide, where a certain testatrix at the time of the execution of her will was a resident of another State and at the time of her death was a resident of this Commonwealth and her will was proved here, by the law of which State the language of the will was to be interpreted, because in regard to the question to be passed upon the law of the two States was the same. *Goodrich* v. *Henderson*, 234.

DISTRICT COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOG.

In an action at common law for personal injuries sustained by reason of the wilful and reckless misconduct of the defendant in setting his dog on the plaintiff when he was a trespasser on the defendant's premises, it is not

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necessary for the plaintiff to allege or prove that he was in the exercise of due care. *Zink* v. *Foss*, 73.

In such an action the plaintiff on obtaining a verdict is not entitled to recover double damages under R. L. c. 102, § 146, on the ground that his injuries were caused by the bite of the defendant's dog. *Ibid.*

And where, in such action, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no occasion for a new trial. *Ibid.*

EASEMENT.

A dedication of land to the use of the public for a park or pleasure ground need not be in writing and may be shown by oral statements of the landowner or of those authorized to act in his behalf, or by acts of the landowner from which his intention can be inferred. *Attorney General* v. *Onset Bay Grove Association*, 342.

On the findings contained in a master's report it was held, that there was evidence that a corporation, whose purposes were to provide a place for holding camp, grove and other meetings of a social and religious character and to create and establish a popular summer resort, by its acts and declarations had dedicated the use of certain lands to the public and ample evidence of acceptance by the public. *Ibid.*

ELECTION.

Where a foreman in the employ of a city, when suspended for cause, filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision. *Gardner* v. *Lowell*, 150.

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, is a personal privilege and not a property right. *Jones* v. *Maguire*, 315.

And therefore before the enactment of St. 1915, c. 23, that right could not be exercised by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Ibid.*

ELECTIONS.

There being no express statutory provision to the contrary, a voter's designation on the official ballot of his choice for a certain office by pasting over a name regularly placed upon the ballot a slip containing the name of a per-

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son not nominated by any party and then placing a cross in the appropriate blank opposite the name, while irregular, is not illegal, and the ballot properly may be counted as a vote for the person named on the slip. *Ray* v. *Registrars of Voters of Ashland*, 223.

Where such election was for the choice of selectmen for a term of three years, the words "three years" placed after the name printed on the slip do not as a matter of law constitute a mark upon the ballot by which it may be identified, as described in St. 1913, c. 835, § 295, nor render the ballot invalid. *Ibid.*

Such a ballot properly may be counted for the man whose name appears upon the paster, although only the capital letters that begin his Christian and surname and his middle initial are printed in type conforming to the requirements of St. 1913, c. 835, §§ 280, 258, 261, as to size and character of the letters. *Ibid.*

ELEVATOR.

Owner of a building was held not to be liable for the death of one, who was invited upon the premises by a tenant and was killed because he stepped into an open freight elevator well, both because the tenant's lease provided that the freight elevator should not be used except for freight and because an alleged custom permitted persons to use that elevator only when they were travelling with freight. *Follins* v. *Dill*, 93.

Provisions in the lease were held not to protect the owner under certain circumstances. *Ibid.*

Evidence which was held to warrant a finding that the owner of a six story building was liable for causing the death of a person, to whom he owed a duty greater than that owed to a mere licensee or trespasser, caused by such person's falling into a freight elevator well because a protecting gate failed to lower itself owing to a defective condition. *Ibid.*

Due care of person so killed. *Ibid.*

EMINENT DOMAIN.

The city of Springfield under its charter, St. 1852, c. 94, § 14, as amended by St. 1872, c. 334, and St. 1873, c. 126, and under the general laws has no authority in laying out or widening a public way to take by eminent domain more than an easement except under the circumstances provided for in St. 1904, c. 443, § 2. *Excelsior Needle Co.* v. *City Council of Springfield*, 34.

The provision of St. 1904, c. 443, § 2, confers no authority to take the fee of any land except in cases where there would be an unsuitable remnant left if only the part actually required for the public undertaking were taken; and accordingly the right to take land in fee is conditional upon there being such an unsuitable remnant which also is taken. *Ibid.*

An attempt by the city of Springfield under St. 1904, c. 443, § 2, to take in fee by right of eminent domain only the part of a certain estate of land which it required for the widening of a public way, which is void as being beyond the powers of the city, cannot be construed as a taking of the public easement which the law allowed to be taken. *Ibid.*

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

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ENTRY, WRIT OF.

See WRIT OF ENTRY.

EQUITABLE RESTRICTION.

An equitable restriction, which was imposed on real estate by deeds made in accordance with a general plan for the benefit of a neighborhood, not only may cease to be enforceable in equity by reason of a complete transformation of the character of the neighborhood, but also may cease to exist and become a mere cloud on the title to the land, removable by a decree in a suit in equity. *McArthur* v. *Hood Rubber Co.* 372.

Facts which were held to warrant a decree for the plaintiff in a suit in equity to have a certain equitable restriction declared no longer in force. *Ibid.*

Upon the same facts, there was not available to the plaintiffs either at common law or by statute such complete and adequate relief as would prevent them from invoking equitable remedies. *Ibid.*

EQUITY JURISDICTION.

Laches.

Where the right of a pledgor to demand and receive certain shares of stock pledged to secure the payment of certain notes given by the pledgor for the accommodation of the pledgor's son was asserted for the first time in a suit in equity brought twenty-eight years after the notes had been paid, and there was nothing to indicate any deception or concealment on the part of the pledgee, it was held, that the suit was barred by laches. *Wehrle* v. *Mercantile National Bank of Salem*, 585.

In the suit above described the facts, that after the notes had been paid the assignee in insolvency of the estate of the pledgor had died and that no successor was appointed until the plaintiff was appointed such successor twenty-two years after the death of the original assignee, were held to have had no effect to suspend the operation of the lapse of time. *Ibid.*

Statute of Limitations.

The ordinary relation of pledgor and pledgee, although sometimes spoken of as in the nature of a trust, is not a fiduciary one as affecting the period of limitation of actions at law or the time within which a suit in equity must be brought. *Wehrle* v. *Mercantile National Bank of Salem*, 585.

Adequate Remedy at Law.

In a suit in equity by a contractor against a city to set aside a contract in writing, under which the plaintiff had constructed a reservoir for the defendant, and recover the fair value of the labor and materials furnished by the plaintiff, an allegation in the bill that the defendant "has assessed" and deducted damages for moneys paid to engineers and inspectors and for pumping states no ground for relief, because, if such deduction was unauthorized, the remedy by an action at law is plain, efficient and exclusive. *Winston* v. *Pittsfield*, 356.

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The Superior Court is not deprived of its jurisdiction in equity to remove clouds upon titles by the provisions of St. 1904, c. 448, conferring exclusive and original jurisdiction upon the Land Court both in law and equity of petitions under R. L. c. 182, §§ 11–14, inclusive, to determine the validity of certain incumbrances. Nor is the remedy granted by those sections so adequate and complete as to exclude general equity jurisdiction of the subject. *McArthur* v. *Hood Rubber Co.* 372.

Suit in equity to have a certain equitable restriction declared no longer enforceable in which it was held that upon the facts there was not available to the plaintiffs either at common law or by statute such complete and adequate relief as will prevent them from invoking equitable remedies. *Ibid.*

If after an award by arbitrators under the provisions of a policy of fire insurance in the Massachusetts standard form, which under the circumstances is invalid as a matter of law, the insured offers to proceed with a new arbitration but the insurer refuses to join therein and insists upon the validity of the award already made, the insured need not resort to a suit in equity for an adjudication of the invalidity of the award, but has an adequate remedy at law in an action upon the policy. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

In such an action he may prove the invalidity of the award and may recover the amount justly due him under the provisions of the policy; and the insurer, if he contends that the award is valid, may offer it in defence to the action. *Ibid.*

Plaintiff must come into Court with Clean Hands.

It was held that a suit in equity against certain shoe manufacturers in a certain city, to enjoin them from blacklisting the plaintiff because he took part in a strike against another shoe manufacturer in the same city, could not be maintained, because for more than three months after the filing of the bill the plaintiff had been taking part in the strike against his employer conducted by unlawful means in which the plaintiff joined. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

Bill for Instructions.

Upon a bill for instructions the executor of a will is entitled to be instructed only as to matters in regard to which it is his duty to act at the time the bill is filed. *Goodrich* v. *Henderson*, 234.

Where in a suit in equity by an executor for instructions the meaning of the will is so plain that there was no sufficient reason for the contending defendants to have insisted upon the opinion of this court being asked for, costs as between solicitor and client will not be allowed out of the fund to the defendants whose plainly untenable contentions made it necessary for the executor to bring the bill for instructions. *Ibid.*

Specific Performance of Contracts.

In suits in equity to enforce the specific performance of contracts to purchase real estate the rule in equity is applicable that the time of performance is not of the essence of the contract unless it has been made so by the parties. *Mansfield* v. *Wiles*, 75.

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In such a suit in equity, where the contract sought to be enforced stated no time for performance and where it appeared that both parties caused delays beyond a time agreed upon after making the contract as a day of performance, it was held that the case came within the rule in equity that time was not of the essence of such a contract where it had not been made so by the parties and that the plaintiff was entitled to a decree for specific performance. *Mansfield* v. *Wiles*, 75.

The right of a vendor to enforce in equity the specific performance of a contract to purchase certain real estate is not lost by the existence of a small incumbrance upon the property which is immaterial to the purchaser. *Ibid.*

An incumbrance, consisting of a strip of land taken from the locus for a State highway but never used, was held to be so small and immaterial that it did not deprive the plaintiff of his right to a decree for specific performance, although the defendant was entitled to a deduction as compensation for the damage, if any, which had been done to the property by the taking. *Ibid.*

To set aside Contract procured by Fraud.

It is settled law that, where a contract to build a certain structure for an agreed compensation has been performed in full by the contractor, the fact that he has completed the work does not deprive him of the right to maintain seasonably a suit in equity to set aside the contract because he was induced to enter into it by fraudulent misrepresentations of the defendant and to recover the fair value of the labor and materials furnished by him to the defendant. *Winston* v. *Pittsfield*, 356.

Allegations of the bill in such a suit which were held not sufficient to show fraud or mutual mistake. *Ibid.*

In such a suit an allegation in the bill that the defendant "has assessed" and deducted damages for money paid to engineers and inspectors and for pumping states no ground for relief, because, if such deduction was unauthorized, the remedy by an action at law is plain, efficient and exclusive. *Ibid.*

To set aside Contract because of Mutual Mistake.

It was held that an alleged mistake in including in a deed of real estate a strip of land not intended to be conveyed could not be corrected in defence to a writ of entry brought by the grantee of the added strip of land to assert his title, unless under R. L. c. 173, § 28, the grantee of the diminished lot could be allowed to set up a mutual mistake of fact as an equitable defence, a question which was not raised in this case. *Pollard* v. *Ketterer*, 317.

In the case above stated, it was said, that another question that was not raised was whether the tenant could obtain relief in a suit in equity to reform the deeds. *Ibid.*

It is settled law that, where a contract to build a certain structure for an agreed compensation has been performed in full by the contractor, the fact that he has completed the work does not deprive him of the right to maintain seasonably a suit in equity to set aside the contract because he was induced to enter into it under mutual and material mistakes of fact and to recover the fair value of the labor and materials furnished by him to the defendant. *Winston* v. *Pittsfield*, 356.

Allegations of the bill in such a suit which were held not sufficient to show mutual mistake. *Ibid.*

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Equity will not give relief by setting aside a contract on the ground of mistake, where, although the plaintiff made a miscalculation when he signed the contract, the terms of the instrument express correctly the exact intention of the defendant. *Winston* v. *Pittsfield*, 356.

Unjust Enrichment.

After St. 1912, c. 675, § 5, amending the small loans act, went into effect, a person unlicensed under the act, who in a transaction which was subject to its provisions accepted a note in place of another note which was valid and was given to him before the act took effect, although he could not maintain an action on the note because it was void, was allowed to recover the amount still due on the note in a suit in equity, no question of jurisdiction having been raised by demurrer or otherwise. *Bennett* v. *Tremont Securities Co.* 218.

To set aside Conveyance in Fraud of Creditors.

At common law (under St. 13 Eliz. c. 5) and apart from statutory provisions a preference of one creditor by paying or securing an honest debt to him to the exclusion of others is not unlawful or voidable by or in behalf of the other creditors, if the sole object of the payment or transfer is to pay or secure the debt. *Lyon* v. *Wallace*, 351.

Suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy on the ground that the transfer was in fraud of creditors at common law, where it was held that the findings of a justice who heard the case did not establish any secret trust in relation to the property transferred to the bankrupt's wife in part payment of a legacy due to her, and that the bill must be dismissed. *Ibid.*

In such suit it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Ibid.*

In such suit the plaintiff was permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present transaction was in fraud of creditors, such evidence being admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors. *Ibid.*

To reach and apply Property conveyed in Fraud of Creditors.

It here was stated as a recognized rule, that, in order that a transfer of property by a debtor to a purchaser for value but in fraud of creditors of the seller should be voidable by such creditors, the purchaser must actually have known of or have participated in the fraudulent purpose of the seller. *Cohen* v. *Levy*, 336.

Suit by Trustee in Bankruptcy.

Provisions of a trust created by a will under which it was held that the trustee in bankruptcy of one of the beneficiaries had no interest during the life of the bankrupt which he could enforce in equity. *Brown* v. *Lumbert*, 419.

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Such bankrupt as an heir at law had an interest in remainder in the real estate held in trust during his life, which became vested on the death of the testator and passed to the trustee in bankruptcy upon the adjudication in bankruptcy, but the trustee in bankruptcy had no occasion to seek the aid of a court of equity as to that interest. *Brown* v. *Lumbert*, 419.

Suit by Stockholder of Corporation to enforce Liability of Directors.

A suit in equity by a stockholder in a corporation alleged to be brought in behalf of himself and all other stockholders who desire to join, to compel the enforcement by the corporation of the liabilities to it of some of its present and former directors by reason of alleged negligence and misconduct in the management of the affairs of the corporation whereby great losses have been incurred, cannot be maintained without alleging and proving a reasonable application to the directors of the corporation to institute proceedings to recover the losses referred to or alleging and proving facts which show that such an application would have been useless. *Bartlett* v. *New York, New Haven, & Hartford Railroad*, 530.

It seems, that, if such an application to the directors fails or would be useless, the aggrieved stockholder must resort to the stockholders and make an honest attempt to convince them that action ought to be instituted, unless there is an adequate reason for not doing this. *Ibid.*

In a certain suit of that nature, the recitals of the bill were held to include no allegation of facts showing that a demand upon the directors for action would have been useless, and on that ground the demurrer was sustained. *Ibid.*

To remove Cloud upon Title.

The Superior Court is not deprived of its jurisdiction in equity to remove clouds upon titles by the provisions of St. 1904, c. 448, conferring exclusive and original jurisdiction upon the Land Court both in law and equity of petitions under R. L. c. 182, §§ 11–14, inclusive, to determine the validity of certain incumbrances. *McArthur* v. *Hood Rubber Co.* 372.

Nor is the remedy granted by those sections so adequate and complete as to exclude general equity jurisdiction of the subject. *Ibid.*

Facts which were held to warrant a decree for the plaintiff in a suit in equity to have a certain equitable restriction declared no longer in force. *Ibid.*

Upon the same facts, there was not available to the plaintiffs either at common law or by statute such complete and adequate relief as would prevent them from invoking equitable remedies. *Ibid.*

To recover Stolen Property in Possession of Police.

A suit in equity may be maintained to recover property stolen from the plaintiff which is in the custody of the police department of a city after having been taken from the thief when he was arrested for another crime and where the officers having custody of the property have refused to expose it so that it can be taken in replevin. *Homrich* v. *Robinson*, 308.

Where in such a case the court has jurisdiction to compel the restoration of specific property stolen from the plaintiff this jurisdiction will be retained to cover also money found in the possession of the thief when he was arrested which he had derived wholly from the sale of other property that he stole from the plaintiff at the same time. *Ibid.*

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Where in such a suit the defendant officers file what they call a stipulation, stating that the property is in their possession as officials and that they stipulate and agree to retain it in their possession until further order of the courts, it seems that the bill should be taken *pro confesso* against them. *Homrich* v. *Robinson*, 308.

To enforce Return of Property delivered Conditionally.

Where notes were delivered with a letter, which was read by the person who received them and which stated, "I understand . . . that, of course, in the event of the deal not being completed the notes will be returned on demand," it was held that, when the transaction was not completed, the maker of the notes was entitled to have them returned to him by the vendors, who were not holders in due course, and might enforce that right by a suit in equity. *Cheney* v. *Taber*, 332.

To enjoin Blacklisting.

A combination of manufacturers of a certain commodity to blacklist the striking employees of another manufacturer of the same commodity, when directed against persons with whom those combining have no trade dispute or when the concerted action coerces the members of the combination by implied threats or otherwise to withhold employment from those whom they otherwise would employ, is on the footing of a boycott and may be enjoined by a court of equity or may afford a ground for recovering damages in an action at law. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

It was held that a suit in equity against certain shoe manufacturers in a certain city, to enjoin them from blacklisting the plaintiff because he took part in a strike against another shoe manufacturer in the same city, could not be maintained, because for more than three months after the filing of the bill the plaintiff had been taking part in the strike against his employer conducted by unlawful means in which the plaintiff joined. *Ibid.*

To enjoin Enforcement of Execution in Action at Law.

It was held that a suit in equity could not be maintained to enjoin the enforcement of an alias execution irregularly issued in an action at law, against one of two joint tortfeasors, but that the defendant's remedy was to bring forward the original action against it and to move to set aside the alias execution for irregularity. *Boston & Maine Railroad* v. *D'Almeida*, 380.

To enjoin Partial Eviction of Tenant.

Where the owner of a building, after giving to a tenant a lease of one of the floors of the building, closes an entrance of the building on a business street which existed when he gave the lease and substitutes another entrance equally convenient to the lessee through a building which the lessor does not own, and later the owner of the substituted entrance closes its connection with the tenant's premises, the lessee may maintain a suit in equity to enjoin the lessor from evicting him from the use of the substituted entrance and for damages, and the lessor is estopped to deny the existence of the substituted entrance as a part of the demised premises and as against the plaintiff cannot show title in another to relieve himself from liability. *Epstein* v. *Dunbar*, 579.

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In the same case it was held, that the partial eviction did not necessarily terminate the lease, so that it was not essential that the tenant should abandon the entire premises before seeking relief in equity. *Epstein* v. *Dunbar*, 579.

In the case stated above the defendant, not having in fact the title to such substituted entrance, cannot be required to reopen the entrance which he does not control, and must respond in damages. *Ibid.*

To enjoin Foreclosure of Mortgage.

Under the circumstances appearing in a suit to enjoin the foreclosure of a mortgage of real estate, it was held that representations of the former beneficial owner of the land, who as agent had procured the execution of the mortgage to the defendants, that he had authority to cause the land to be conveyed to the predecessor in title of the plaintiff and that no other mortgage had been made, did not estop the defendants from proceeding with the foreclosure of their mortgage. *Hanson* v. *Griswold*, 228.

In a suit to enjoin the foreclosure of a mortgage of real estate, where the plaintiff, besides praying for an injunction, had added to his bill a prayer that an underlying mortgage, which had been discharged upon a conveyance of the land to the predecessor in title of the plaintiff with a representation that there was no such mortgage as that to the defendant, might be revived in favor of the plaintiff, it was held, that on the bill to enjoin the foreclosure of the junior mortgage no relief founded on such a declaration could be granted. *Ibid.*

Equitable Restriction.

Suit in equity to remove a cloud upon a title caused by a recorded equitable restriction which had become unenforceable. *McArthur* v. *Hood Rubber Co.* 372.

Damages in Suit in Equity.

In a suit in equity by a lessee to enjoin a lessor from closing an entrance to the leased premises over land of another, which had been substituted for the entrance in existence when the lease was signed, the defendant, not having in fact the title to such substituted entrance, cannot be required to reopen the entrance which he does not control, and must respond in damages. *Epstein* v. *Dunbar*, 579.

Declaratory Decree.

A court of equity has no jurisdiction to make a declaratory decree on which no relief can be based. *Hanson* v. *Griswold*, 228.

In a suit to enjoin the foreclosure of a mortgage of real estate, where the plaintiff, besides praying for an injunction, had added to his bill a prayer that an underlying mortgage, which had been discharged upon a conveyance of the land to the predecessor in title of the plaintiff with a representation that there was no such mortgage as that to the defendant, might be revived in favor of the plaintiff, it was held that on the bill to enjoin the foreclosure of the junior mortgage no relief founded on such a declaration could be granted. *Ibid.*

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EQUITY PLEADING AND PRACTICE.

Parties.

Upon the granting of a motion made by the plaintiff in a suit in equity that a certain person be joined as a party defendant, such person does not become a defendant until he has been served with a subpoena or has appeared voluntarily. *Cohen* v. *Levy*, 336.

In a suit in equity against two defendants to reach and apply in payment of a debt, owed to the plaintiff by one of the defendants, property conveyed by that defendant in fraud of his creditors to the other defendant, on an appeal by the defendants from a final decree which directs that persons who are not parties to the suit shall deliver certain property to the plaintiff, the decree must be reversed. *Ibid.*

A general creditor of one who in selling his entire stock of merchandise failed to furnish a list of his general creditors to the purchaser so that the purchaser did not give notice of the sale to such creditors as required by St. 1903, c. 415, cannot procure the setting aside of the sale in a proceeding in which the purchaser is not made a party. *Rabalsky* v. *Levenson*, 289.

Demurrer.

In a suit in equity, where the defendant has filed a demurrer and also an answer, the reference of the case to a master to find the facts without any objection on the part of the defendant and the appearance of the defendant at the hearings before the master are a waiver of the demurrer. *Attorney General* v. *Onset Bay Grove Association*, 342.

Master.

Finding of a master, who heard a suit in equity involving the question, what was a proper computation of the net profits of a corporation, that a certain witness was qualified to testify as an expert on the question of the rates of depreciation of the defendant's plant, was held not to have been improper. *Stein* v. *Strathmore Worsted Mills*, 86.

In a suit in equity, where the defendant had filed a demurrer and also an answer, the reference of the case to a master to find the facts without any objection on the part of the defendant and the appearance of the defendant at the hearings before a master are a waiver of the demurrer. *Attorney General* v. *Onset Bay Grove Association*, 342.

Where a suit in equity is referred to a master "to find the facts, and report the same to the court," no exception can be sustained to the refusal of the master to pass upon requests for rulings of law. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

Exceptions to Master's Report.

Where a suit in equity is referred to a master "to find the facts, and report the same to the court," no exception can be sustained to the refusal of the master to pass upon requests for rulings of law. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

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Findings of Trial Judge.

On an appeal from a final decree in a suit in equity, where it appears that the findings of the trial judge were made under a common law rule that was not applicable to the case and that the judge made no finding of fact under the rule in equity that should have been applied, the consideration of the case in this court is not affected by the decision of the trial judge. *Mansfield* v. *Wiles*, 75.

The rule that the decision of a judge sitting in equity will not be reversed on appeal unless clearly erroneous is not applicable to a finding of a trial judge which depends upon an inference drawn by him from evidence not in conflict. In regard to the drawing of such an inference this court stands in the same position that the trial judge stood. *Ibid.*

Decree.

Pro confesso.

In a suit in equity to recover certain property of the plaintiff which had been stolen from him by two of the defendants and which was alleged to be in the custody of the other defendants, who were officers of the police department of a city, if such officers file what they call a stipulation, stating that the property is in their possession as officials and that they stipulate and agree to retain it in their possession until further order of the court, it seems, that the bill should be taken *pro confesso* against them. *Homrich* v. *Robinson*, 308.

Final.

A court of equity has no jurisdiction to make a declaratory decree on which no relief can be based. *Hanson* v. *Griswold*, 228.

Application of the foregoing principle of law in a suit to enjoin the foreclosure of a mortgage of real estate, where the plaintiff, besides praying for an injunction, had added to his bill a prayer that an underlying mortgage, which had been discharged upon a conveyance of the land of the predecessor in title of the plaintiff with a representation that there was no such mortgage as that to the defendant, might be revived in favor of the plaintiff. *Ibid.*

In a suit in equity against two defendants to reach and apply in payment of a debt, owed to the plaintiff by one of the defendants, property conveyed by that defendant in fraud of his creditors to the other defendant, on an appeal by the defendants from a final decree which directs that persons who are not parties to the suit shall deliver certain property to the plaintiff, the decree must be reversed. *Cohen* v. *Levy*, 336.

Where, in a suit in equity against a number of defendants, some of the defendants consent to the granting of the relief prayed for in the bill and the bill is taken *pro confesso* against all of the other defendants, while a final decree as prayed for may be entered against those consenting thereto, no such decree will be entered against those against whom the bill was taken *pro confesso* unless the facts alleged in the bill are sufficient to authorize such relief. *McArthur* v. *Hood Rubber Co.* 372.

In the above case, a decree dismissing a bill under such circumstances was reversed on appeal and a decree in accordance with the prayers of the bill was ordered. *Ibid.*

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Costs.

Where in a suit in equity by an executor for instructions the meaning of the will is so plain that there was no sufficient reason for the contending defendants to have insisted upon the opinion of this court being asked for, costs as between solicitor and client will not be allowed out of the fund to the defendants whose plainly untenable contentions made it necessary for the executor to bring the bill for instructions. *Goodrich* v. *Henderson*, 234.

Appeal.

The rule that the decision of a judge sitting in equity will not be reversed on appeal unless clearly erroneous is not applicable to a finding of a trial judge which depends upon an inference drawn by him from evidence not in conflict. In regard to the drawing of such an inference this court stands in the same position that the trial judge stood. *Mansfield* v. *Wiles*, 75.

On an appeal from a final decree in equity, where it appears that the findings of the trial judge were made under a common law rule that was not applicable to the case and that the judge made no finding of fact under the rule in equity that should have been applied, the consideration of the case in this court is not affected by the decision of the trial judge. *Ibid.*

In a suit in equity against two defendants to reach and apply in payment of a debt, owed to the plaintiff by one of the defendants, property conveyed by that defendant in fraud of his creditors to the other defendant, on an appeal by the defendants from a final decree which directs that persons who are not parties to the suit shall deliver certain property to the plaintiff, the decree must be reversed. *Cohen* v. *Levy*, 336.

ESTOPPEL.

Under the circumstances appearing in a suit to enjoin the foreclosure of a mortgage of real estate, it was held that representations of the former beneficial owner of the land, who as agent had procured the execution of the mortgage to the defendants, that he had authority to cause the land to be conveyed to the predecessor in title of the plaintiff, and that no such mortgage had been made, did not estop the defendants from proceeding with the foreclosure of their mortgage. *Hanson* v. *Griswold*, 228.

In an action brought by a millowner against his customer on a contract for furnishing to the defendant the entire product of the plaintiff's mill, it was held that a certain letter sent by the plaintiff to the defendant when they were at issue as to the actual cost of finishing, in which, because of the position taken by the defendant, the plaintiff said, "we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the meantime try and take care of your orders," did not estop the plaintiff from claiming damages from the defendant for not taking paper after its date, it appearing that the plaintiff was right as to the price insisted upon by him. *Fillmore* v. *Johnson*, 406.

Where the owner of a building, after giving to a tenant a lease of one of the floors of the building, closes an entrance of the building on a business street which existed when he gave the lease and substitutes another entrance equally convenient to the lessee through a building which the lessor does

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not own, and later the owner of the susbtituted entrance closes its connection with the tenant's premises, the lessee may maintain a suit in equity to enjoin the lessor from evicting him from the use of the substituted entrance and for damages, and the lessor is estopped to deny the existence of the substituted entrance as a part of the demised premises and as against the plaintiff cannot show title in another to relieve himself from liability. *Epstein* v. *Dunbar*, 579.

EVIDENCE.

Presumptions and Burden of Proof.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

The record of a police court is conclusive and cannot be controlled by oral evidence. *Haskell* v. *Cunningham*, 49.

Although after the making of a common law assignment for the benefit of creditors continued possession by the assignor of the property assigned often is evidence of fraud, yet it is not conclusive evidence, and the circumstances may be such as to show that there was no fraud. *Cropper* v. *Gorham*, 119.

Where at the trial of an action upon a policy of accident insurance providing for the payment of a certain sum in the event of the death of the insured "wholly and entirely by external, violent, and accidental means," a case of death by violent and external means is made out by the evidence, there is a presumption of fact that the death was not intentional and that the injuries causing it were not self-inflicted. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

Therefore, although without such presumption the evidence might not be sufficient to warrant a finding that the cause of the death was wholly accidental, it cannot be ruled as a matter of law under such circumstances that the question, whether such cause was wholly accidental, should not be left to the jury. *Ibid.*

In a suit in equity against a corporation manufacturing textile products to recover for services of the plaintiff for which the defendant agreed to pay him, in addition to a fixed salary, a percentage of its net profits, where in computing the net profits it was necessary to make an allowance for depreciation of the plant, and the defendant in making such allowance had adopted the method commonly prevailing in its kind of business of deducting a percentage and thus deducting six per cent from the cost value of the plant, which a master found was a reasonable allowance for depreciation, it was held, that the burden was on the plaintiff to show that six was a wrong percentage to deduct, and that the finding of the master on this point, being warranted by the evidence, could not be pronounced erroneous. *Stein* v. *Strathmore Worsted Mills*, 86.

In an action on a negotiable promissory note, where the defendant has introduced evidence that the note was obtained from him by duress of the

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payee who indorsed the note to the plaintiff, if this evidence is believed, the burden is on the plaintiff to prove that he was a holder in due course as defined in R. L. c. 73, § 69. *Phillips* v. *Eldridge*, 103.

In such an action it was held to have been improper to order a verdict for the plaintiff although the plaintiff and the payee, called as adverse witnesses by the defendant, gave some evidence tending to show that the plaintiff was a holder in due course. *Ibid.*

The provision of St. 1905, c. 288, regarding a report by the judge of the Land Court of his decision, in case of an appeal from the Land Court to the Superior Court for a jury trial on the facts, and the use of the report as evidence, so far as it relates to the effect of the report is a rule of evidence and findings contained in such a report which are based on extrinsic evidence that should not have been admitted to affect the construction of a clear description in a deed have no probative force. *Pollard* v. *Ketterer*, 317.

At the trial of an action upon a policy of accident insurance which contained a provision that no indemnity should be paid if the death of the insured resulted from an injury "caused wholly or in part . . . by . . . voluntary exposure to unnecessary danger . . . nor for any injury which the" insured "by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which" his "own negligence shall have contributed," the burden of sustaining a defence under such provisions is on the defendant, and a verdict in its favor cannot be ordered. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

Where a policy of accident insurance provided that the insurer's liability should be limited to a certain indemnity in case the insured changed his occupation to one rated as more hazardous and, at the trial of an action for indemnity under the policy, the insurer contended that the insured had made such a change, the burden of establishing that fact was held to be upon the insurer and, where the evidence was not undisputed, it was held to be proper for the presiding judge to refuse to rule that that burden was sustained. *Constantino* v. *Massachusetts Accident Co.* 464.

Where it appeared at the trial of an action upon a certain policy of accident insurance, which required that "proofs of claim on blanks furnished by the company must be filed with the company," that the blank, furnished to the insured after he had been injured while in the employ of a manufacturing corporation, required a certificate as to the circumstances from the insured, his physician and the employer, although the policy did not in terms require such a certificate, and that the employer refused to give such a certificate, if the insured furnished the certificates of himself and of his physician, it cannot be ruled as a matter of law that his failure to furnish that of his employer bars his recovery. *Ibid.*

In an action under R. L. c. 99, § 4, the presumption created by the provision of R. L. c. 99, § 6, that the fact that the seller or the person employing another to sell for his account did not own the securities at the time of giving the order to sell shall "be *prima facie* evidence that within the meaning of section four there was an intention that there should be no actual purchase or sale," does not apply to the issue of the affirmative defence under § 4 that the purchases and sales were actual ones. *Chandler* v. *Prince*, 495.

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Admissions.

In an action for a breach of an alleged contract, a mere acknowledgment of the receipt of a certain letter from an attorney for the plaintiff and the referring of the writer to an attorney at law were held not to make the letter thus received admissible in evidence against the defendant. *Smith* v. *Abbott*, 326.

And this was especially true because the letter contained self-serving statements of the plaintiff's views of the relations of the parties and was introduced to show a ratification by the defendant of an unauthorized agreement made by his attorney. *Ibid.*

In a suit in equity to set aside a conveyance by a husband to his wife alleged to have been made in fraud of creditors at common law, it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Lyon* v. *Wallace*, 351.

In an action brought by a millowner against his customer on a contract for furnishing to the defendant the entire product of the plaintiff's mill, it was held that a certain letter sent by the plaintiff to the defendant when they were at issue as to the actual cost of finishing, in which, because of the position taken by the defendant, the plaintiff said, "we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the meantime try and take care of your orders," did not estop the plaintiff from claiming damages from the defendant for not taking paper after its date, it appearing that the plaintiff was right as to the price insisted upon by him. *Fillmore* v. *Johnson*, 406.

Where at the trial of an action it appeared that, before the action was begun, the plaintiff offered to "arbitrate . . . and meet you in every way that is mutually fair, that is fair to you and also to us," and that the defendant refused to leave the matter to arbitration, it was held that an instruction by the presiding judge that, although the defendant was not bound to arbitrate any question if he did not care to, his failure to arbitrate the actual cost of finishing could be taken into account by the jury if they thought it had any bearing upon the position which he took when he refused to do so, was held to be without error. *Ibid.*

Competency.

Where the judge presiding at the trial of an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, improperly allowed the plaintiff to show that the defendant in his application to the highway commission for a license to operate his automobile had failed to answer a question calling for the disclosure of any physical incapacity or infirmity, an exception by the plaintiff to a ruling permitting the defendant to explain his understanding of the meaning of the question in the application cannot be sustained. *O'Hare* v. *Gloag*, 24.

In the foregoing action, where the declaration alleged that the defendant was physically unfit to operate an automobile by reason of his infirmities, the defendant properly was permitted to introduce evidence as to the manner in which he operated his automobile during the two years after the accident

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and that his physical condition had not changed materially from the time of the accident to the time of the trial for the purpose of rebutting the inference that at the time of the accident the defendant was unfit to control an automobile on account of his disabilities. *O'Hare* v. *Gloag*, 24.

But it was held that such evidence was not admissible for the purpose of showing that the defendant was operating the automobile carefully at the time of the accident. *Ibid.*

At the trial of the foregoing action evidence, introduced by the defendant, that the defendant after the accident drove his automobile carefully and that he was a slow and careful driver, clearly was incompetent. *Ibid.*

Evidence, admitted at the trial of an indictment under R. L. c. 215, § 2, for being an accessory before the fact to the felony of burning the defendant's factory to defraud certain insurance companies in violation of R. L. c. 208, § 10, that a month or two before the fire the defendant's brother called at a certain store and asked the proprietor "if he could let him have a number of dozen of cork stopples, at the same time holding out a cork which he held in his hand, said cork being the type ordinarily used in one half pint bottles," but that the proprietor had no corks of that size, was held to have been admitted improperly. *Commonwealth* v. *Derry*, 45.

At the same trial, evidence that in the month before the fire the defendant's brother bought at another store perhaps a dozen or two or three or four dozen "small corks for half pint bottles" was held to have been admitted properly. *Ibid.*

Where, at the trial of an action by a tailor for personal injuries, the plaintiff had introduced without objection evidence tending to show his physical inability to do his usual work consequent upon his injuries, it was held to have been error for the presiding judge thereafter, against the defendant's exception, to permit the plaintiff to show that the profits of his business for the six months before the accident were $1,200 and that for the corresponding period after the accident they were only $500. *Mahoney* v. *Boston Elevated Railway*, 116.

In an action by a workman in a shoe factory against a corporation doing a retail clothing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant, testimony of the plaintiff, that he was discharged by the foreman who said the superintendent "told me to let you go," while not strictly competent as to the alleged statement made by the superintendent to the foreman, was held not to have affected injuriously the substantial rights of the defendant. *Kennedy* v. *Hub Manuf. Co.* 136.

In the same case it was held that testimony as to the average wages of those employed in the shop of the plaintiff's employer in the same work in which the plaintiff was employed was competent as tending to show the rate of compensation to which the plaintiff might have attained but for his discharge, there being other evidence that the plaintiff at the time of his discharge was receiving almost as much as such average. *Ibid.*

In the same action it was held that evidence was admissible in the cross-examination of a witness, who was the predecessor in title of the defendant, for the purpose of attempting to refresh his recollection, that three years before the defendant was incorporated the witness had caused to be served

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upon another employer of the plaintiff a copy of an assignment of his wages under the same power of attorney. *Kennedy* v. *Hub Manuf. Co.* 136.

And for this purpose a letter to the witness in regard to this subject, which he had acknowledged receiving, was competent. *Ibid.*

Also the fact, that two assignments of the plaintiff's wages were executed under a power of attorney that authorized an execution of "an assignment," had a possible bearing upon the issue of malice. *Ibid.*

Relevancy and Materiality.

Interrogatories, filed by the defendant for the taking of the deposition of its motorman in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," relating to the witness's personal knowledge of the horse's manifestation of fright, which, with their answers, were held to have been admitted properly by the presiding judge in the exercise of his discretion. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Where, at the trial of issues, framed on an appeal from a decree of the Probate Court allowing a will and relating to the testator's mental capacity and as to whether undue influence was exerted upon him, it appears that the testator stated in the will that his reason for leaving nothing to the appellant, who was his sister and his sole heir at law, was that she had abundant property for her needs, the appellant may be asked in her cross-examination as a witness to state the amount, kind and location of her property. *Dunster* v. *Goward*, 339.

In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the defendant's servants, the plaintiff cannot ask the conductor who was in charge of the defendant's car on his cross-examination, what experience the motorman who was operating the car at the time of the accident had had. *Sport, petitioner*, 453.

Extrinsic affecting Writings.

An agreement to renew a promissory note is a collateral agreement and not an agreement that contradicts the note. *Keith* v. *Radway*, 515.

In an action by the assignee of an insolvent debtor under a common law assignment in writing clearly stated to be for the benefit of creditors to collect a debt admitted to be due to such debtor, testimony of the insolvent assignor that he understood the assignment to be for the benefit of some of his creditors and not for the benefit of all of them cannot affect the construction of the instrument of assignment. *Cropper* v. *Gorham*, 119.

Opinion: Experts.

Expert testimony as to what was the proper method of doing certain work on a guy pole, offered at the trial of an action against a street railway company for causing the death of a lineman resulting from the breaking of the guy pole, which, it was held, might properly have been excluded because it was immaterial. *MacLellan* v. *Boston Elevated Railway*, 20.

Finding of a master, who heard a suit in equity involving the question, what was a proper computation of the net profits of a corporation, that a certain

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witness was qualified to testify as an expert on the question of the rates of depreciation of the defendant's plant, was held not to have been improper. *Stein* v. *Strathmore Worsted Mills*, 86.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, where a certain witness was asked as to a certain period "What did you notice in that period about" the alleged testator "as to whether he was easily influenced?" and answered, "He was childish," it was held that the answer properly was stricken out by the presiding judge, the witness on further examination apparently stating all the facts from which he drew his conclusion and they appearing to be neither complex, difficult of statement or description nor full of minute detail. *Johnson* v. *Foster*, 248.

It seems that a witness properly may be allowed to state a conclusion of fact at which he arrived as the result of his personal observation, when the facts upon which his inference was based are so complex and so difficult to narrate as to make their presentation to the jury impracticable. *Ibid.*

Interrogatories, filed by the defendant for the taking of the deposition of its motorman in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," relating to the witness's personal knowledge of the horse's manifestation of fright, which, with their answers, were held to have been admitted in evidence properly by the presiding judge in the exercise of his discretion. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Also as a matter of discretion answers of such witness to questions asked on his direct examination as to whether or not there was any unusual or unnecessary ringing of the gong or blowing of the whistle at any time before the accident as alleged in the plaintiff's declaration, properly may be admitted, the conclusions of fact involved in this answer and in answers to the other questions described above not being a sufficient reason for their exclusion. *Ibid.*

In an action by a woman, named as the beneficiary in an insurance policy and there designated as the "affianced" of the insured, against the company upon the policy, where the administrator of the estate of the insured was summoned as an adverse claimant, a declaration of the insured, "If anything does happen to me, I have had my life insured and Charlotte [the plaintiff] will have that anyway," which was admissible as showing his intention, was held to be a statement of fact and not incompetent as expressing an opinion on a past transaction. *Crosby* v. *Mutual Benefit Life Ins. Co.* 461.

Remoteness.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, a limitation by the presiding judge in the exercise of his discretion of the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged codicil was held to be neither unfair nor arbitrary. *Johnson* v. *Foster*, 248.

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At the trial of an action for malicious prosecution of the plaintiff on the charge of larceny, evidence, offered to show another cause for a loss of patronage in the plaintiff's business and relating to an indictment, trial and aquittal of the plaintiff on the charge of abortion four years after the alleged malicious prosecution, properly was excluded as too remote. *Reed* v. *Kimball*, 481.

Declarations of Deceased Persons.

Whether a declaration of a deceased person which is offered in evidence was made "upon the personal knowledge of the declarant" is a preliminary question to be decided by the presiding judge before the declaration can become admissible under R. L. c. 175, § 66, and the judge's conclusion of fact on such preliminary question is not subject to revision unless manifestly wrong. *Johnson* v. *Foster*, 248.

Where a judge presiding at a trial found that certain declarations of a deceased person, offered in evidence under R. L. C. 175, § 66, were made of the declarant's own knowledge, and admitted the declarations in evidence, and where the evidence did not warrant such a finding, the ruling admitting the evidence is subject to an exception, and an exception thereto must be sustained. *Ames* v. *New York, New Haven, & Hartford Railroad*, 304.

Exception to the admission of such evidence which, it was held, should be sustained. *Ibid.*

In an action by a woman named as the beneficiary in an insurance policy and there designated as the "affianced" of the insured, against the company upon the policy, where the administrator of the estate of the insured was summoned as an adverse claimant, certain statements of the insured during his last illness, which tended to show that he did not intend to revoke the designation of the plaintiff as the beneficiary of his policy, were held to be admissible as the declarations of a deceased person under R. L. c. 175, § 66. *Crosby* v. *Mutual Benefit Life Ins. Co.* 461.

Judicial Record.

The record of a police court is conclusive and cannot be controlled by oral evidence. *Haskell* v. *Cunningham*, 49.

Report of Judge of Land Court.

The provision of St. 1905, c. 288, regarding a report by the judge of the Land Court of his decision, in case of an appeal from the Land Court to the Superior Court for a jury trial on the facts, and the use of the report as evidence, so far as it relates to the effect of the report is a rule of evidence and findings contained in such a report which are based on extrinsic evidence that should not have been admitted to affect the construction of a clear description in a deed have no probative force. *Pollard* v. *Ketterer*, 317.

Report of Inquest.

It was held that a report of an inquest annexed to a letter, sent by the attorney of the beneficiary under a policy of accident insurance to the insurer and containing a statement of the claim of the indemnity, properly might be admitted in evidence at the trial of an action for the indemnity, not as evidence of the manner of death or its cause, but solely for the purpose of

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deciding whether the report, with the other information obtained by the insurer, ought to have satisfied the defendant that the cause of death was an accident within the provisions of the policy. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

Testimony at Former Trial.

At a new trial of an action, after a rescript of this court sustaining exceptions, a transcript of the testimony given at the former trial by one of the witnesses for the adverse party who is living and within the jurisdiction of the court, is not competent in place of the witness who might be summoned. *Chandler* v. *Prince*, 495.

Res inter Alios.

In a suit in equity to set aside a conveyance from a bankrupt to his wife as in fraud of creditors at common law, the plaintiff was permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present transaction was in fraud of creditors, such evidence being admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors. *Lyon* v. *Wallace*, 351.

Self-serving Statements.

In an action for a breach of an alleged contract, a mere acknowledgment of the receipt of a certain letter from an attorney for the plaintiff and the referring of the writer to an attorney at law, were held not to make the letter thus received admissible in evidence against the defendant. *Smith* v. *Abbott*, 326.

And this was especially true because the letter contained self-serving statements of the plaintiff's views of the relations of the parties and was introduced to show a ratification by the defendant of an unauthorized agreement made by his attorney. *Ibid.*

Evidence admitted de Bene.

Where at a trial evidence which was objected to was admitted *de bene* by the presiding judge, and an exception was taken to its admission, this exception to the provisional admission of the evidence cannot be sustained unless the excepting party afterwards asked to have the evidence stricken out. *Haskell* v. *Cunningham*, 49.

Evidence admitted for Limited Purpose.

It was held that a report of an inquest annexed to a letter, sent by the attorney of the beneficiary under a policy of accident insurance to the insurer and containing a statement of the claim of the indemnity, properly might be admitted in evidence at the trial of an action for the indemnity, not as evidence of the manner of death or its cause, but solely for the purpose of deciding whether the report, with the other information obtained by the insurer, ought to have satisfied the defendant that the cause of the death was an accident within the provisions of the policy. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

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Of Customary Practice.

At the trial of an action of tort by an administrator against a street railway company for causing the death of a workman in a wide street in a city, evidence as to a practice of the defendant of running its cars slowly and of striking the gong continuously while passing through an area where repairs were being made was admissible, not only to show how the cars were run, but also to show that the intestate knew of the usual method and presumably governed his conduct accordingly. *McCue* v. *Boston Elevated Railway*, 432.

Dictated Letter.

It was held that the testimony in an action of contract relating to a letter purporting to have been dictated by a witness, whom the defendant was seeking to impeach, which was typewritten on paper with the heading of the witness's firm and was signed in typewriting in the name of the witness, required that the letter be admitted in evidence in order that the jury might pass upon the question whether the witness dictated it so that, if they found that he did, they might consider it upon the question of the witness's credibility. *Slotnick* v. *Silberstein*, 59.

Of Fraud and Fraudulent Intent.

Although after the making of a common law assignment for the benefit of creditors continued possession by the assignor of the property assigned often is evidence of fraud, yet it is not conclusive evidence, and the circumstances may be such as to show that there was no fraud. *Cropper* v. *Gorham*, 119.

In a suit in equity to set aside a conveyance from a bankrupt to his wife as in fraud of creditors at common law, the plaintiff was permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present transaction was in fraud of creditors, such evidence being admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors. *Lyon* v. *Wallace*, 351.

In such suit it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Ibid.*

Failure of Party to Testify.

In a suit in equity to set aside a conveyance by a husband to his wife alleged to have been made in fraud of creditors at common law, it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Lyon* v. *Wallace*, 351.

Of Mental Condition.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, where a certain witness was asked as to a certain period "What did you notice in that period about" the alleged

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testator "as to whether he was easily influenced?" and answered, "He was childish," it was held that the answer properly was stricken out by the presiding judge, the witness on further examination apparently stating all the facts from which he drew his conclusion, and they appearing to be neither complex, difficult of statement or description nor full of minute detail. *Johnson* v. *Foster*, 248.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, a limitation by the presiding judge in the exercise of his discretion of the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged will and ending four years after the date of the alleged codicil, was held to be neither unfair nor arbitrary. *Ibid.*

Of Nature of Death.

Where at the trial of an action upon a policy of accident insurance providing for the payment of a certain sum in the event of the death of the insured "Wholly and entirely by external, violent, and accidental means," a case of death by violent and external means is made out by the evidence, there is a presumption of fact that the death was not intentional and that the injuries causing it were not self-inflicted. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

Therefore, although without such presumption the evidence might not be sufficient to warrant a finding that the cause of the death was wholly accidental, it cannot be ruled as a matter of law under such circumstances that the question, whether such cause was wholly accidental, should not be left to the jury. *Ibid.*

To prove Ownership.

In an action against a street railway company for causing the death of a lineman in its employ, where it appeared that the death was caused by the breaking of a guy pole, it was held that the evidence did not warrant a finding that the pole belonged to the defendant although there was evidence tending to show that after the pole was broken it was carried away on a team of the defendant. *MacLellan* v. *Boston Elevated Railway*, 20.

Of Terms of Oral Letting.

Where, in an action involving the duties of the proprietor of a tenement house toward one of his tenants, the contract of letting does not appear to have been in writing and there is no direct and positive evidence as to its terms, the conduct of the landlord and of the tenant, so far as the conduct of each was so open and notorious that it must have been known to the other, may be resorted to for the purpose of determining the terms of the tenancy according to the intention and contemplation of the parties. *Gallagher* v. *Murphy*, 363.

Violation of Ordinance.

In an action by a workman against his employer for personal injuries caused by the falling of an elevator by reason of the breaking of a wire cable and the failure to work of a safety clutch, evidence is not admissible which tends merely to show that the defendant failed to notify the superintendent

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of public buildings of the accident as required by an ordinance of the city in which the accident happened. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

Violation by the owner of a building of a permit of the building department and of an ordinance of a city, which resulted in the construction of a stairway in such a position as to cause injury to one later coming upon the premises at the invitation of a tenant, was held under the circumstances not to affect the question of liability of the owner for such injuries. *Mackey* v. *Lonergan*, 296.

EXCEPTIONS.

See appropriate subtitles under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT.

EXECUTION.

It was held that a suit in equity could not be maintained to enjoin the enforcement of an alias execution, irregularly issued in an action at law, against one of two joint tortfeasors, but that the defendant's remedy was to bring forward the original action against it and to move to set aside the alias execution for irregularity. *Boston & Maine Railroad* v. *D'Almeida*, 380.

EXECUTOR AND ADMINISTRATOR.

Taxation.

Where the executors of a will also were the trustees thereunder and made a return to the assessors that they had delivered to themselves as trustees a certain amount of personal property, but they had made no distribution to themselves as trustees which had been allowed by the Probate Court, a failure of the assessors of a town to deduct from the tax assessed to such executors the amount assessed to them as trustees on their return to the assessors was held not to be good cause for a failure of the executors to bring in a list of property in accordance with the provisions of the statutes named above. *Sears* v. *Nahant*, 437.

Especially was this true where no inventory or account had been filed in the Probate Court by the executors and they persistently had refused to bring in a list of property to the assessors or to give any information as to the total amount of the taxable property received by them as executors and had declined to answer any questions as executors, and where their conduct was calculated deliberately to screen from the observation of the assessors material facts in regard to the property that had come to their hands. *Ibid.*

On such facts it was held, that a judge of the Superior Court was not required as matter of law to find that the executors had good cause for not bringing in a list of the taxable property in their hands; and that indeed such a finding would not have been warranted, because as matter of law no adequate excuse was shown. *Ibid.*

The advice of counsel to an executor that he is not required to bring in to the assessors of a town a list of taxable property of the estate of his testator under the provisions of St. 1909, c. 490, Part I, §§ 41, 49, is not as matter of law good cause for a failure of the executor to bring in such a list. *Ibid.*

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Insolvent Estate.

If, upon demand being made, an administrator with the will annexed of an estate which has not been represented to be insolvent neglects to pay an execution issued on a judgment against him in his official capacity or to show sufficient goods or estate of the testator to satisfy the judgment, there is *prima facie* a breach of his bond given as prescribed by R. L. c. 149, § 1, cl. 1. *Harmon* v. *Sweet*, 587.

The provision of R. L. c. 149, § 20, not only gives the judgment creditor, where the estate has not been represented to be insolvent, a right to put the bond in suit without obtaining authority to do so from the Probate Court, but also means that the failure under the circumstances stated to pay or to exhibit sufficient goods or estate of the deceased is *prima facie* a breach of the second condition of the executor's or administrator's bond. *Ibid.*

By R. L. c. 142, § 2, it is made the duty of an executor or administrator to represent the estate of the deceased to be insolvent if it appears that the estate is insufficient to pay all debts of which he has had notice. *Ibid.*

Where as stated above there is *prima facie* a breach of the second condition of the bond of an administrator, the administrator is liable on his bond unless he represents the estate to be insolvent and establishes under R. L. c. 141, § 5, the affirmative defence that upon the settlement of his account in the Probate Court the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased. *Ibid.*

To establish such an affirmative defence based on a representation of insolvency it must appear by a final adjudication that the estate is insolvent. *Ibid.*

After the representation of insolvency is made, the administrator and his sureties are entitled to have the action on the bond continued until the result of the representation of insolvency is ascertained. *Ibid.*

It was said that, when an action by a creditor against the administrator of the estate of a deceased debtor is pending and is about to result in a judgment in favor of the creditor and there is a doubt whether the estate of the deceased debtor is solvent or insolvent, the administrator at that time, before the judgment is obtained, should represent the estate to be insolvent, if he has not done so already. *Ibid.*

Where two actions against the surety on an administrator's bond, each brought by a separate judgment creditor under R. L. c. 149, § 20, had been tried together, it was said, that, although each of the creditors under the circumstances that existed had a right to put the bond in suit, it was plain that the surety was not subject to have two judgments entered against him, each for the penal sum of the bond. *Ibid.*

And that it would seem that both actions might be prosecuted until judgment was recovered in one of them and that then the fact that judgment had been recovered in that action would be a bar to entering judgment in the other. *Ibid.*

But that, whether this was the proper way to preserve and give effect to the rights of all the parties, it was not necessary to decide at the present time. *Ibid.*

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EXPRESS COMPANY.

Driver of an express team was held to have no authority to waive a limitation of liability in a receipt for a trunk. *Boynton* v. *American Express Co.* 237.

Where the servant of the owner of a trunk delivered it to a driver in the employ of an express company and took from the driver a receipt containing a clause limiting the damage to be recovered in case of loss unless the value was declared at the time of the shipment, and, upon the driver asking for the value, the servant requested him to obtain the information from the owner at his office, the fact that neither the owner of the trunk nor his servant read the receipt or knew of the limitation of damage until after the trunk was lost, was held not to affect the right of the express company to rely on the limitation of damage. *Ibid.*

Nor was that right affected by a failure of the driver to call at the owner's office for a declaration of value, because the driver was under no obligation to do this and did not agree to do it, and, if he had so agreed, had no authority to waive any portion of the contract. *Ibid.*

FEES.

Under St. 1906, c. 291, § 4, the fees paid by licensees under R. L. c. 100, § 10, to the secretary of the licensing board of the city of Boston as the recording officer for recording each license must be paid into the city treasury. *Boston* v. *Epple*, 395.

FENCE AND FENCE VIEWERS.

Upon a complaint of a landowner made to fence viewers under R. L. c. 33, where the erection of a division fence is desired, the fence viewers, if their award is to have any validity as the basis of a cause of action, must decide not only that a fence is necessary but also what part of the fence each landowner is to construct. *O'Malley* v. *Meyer*, 198.

In the absence of a decision as to such apportionment, a landowner, who, after the fence viewers determined that a division fence was necessary, built the whole of it himself, cannot maintain an action of contract against the owner of the adjoining land to recover double the value of one half of the fence he has built, his rights being governed and limited by the statute. *Ibid.*

Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, was a tenant or licensee, was not passed upon. *Stevenson* v. *Donnelly*, 161.

In an action for use and occupation of a fence upon land of the plaintiff for bill posting purposes, if there is no evidence as to any talk between the plaintiff and the defendant as to the use of the fence by the defendant, and if the evidence tends merely to show that the defendant made a contract for the use of the fence with a person who had no authority to make such a contract on the plaintiff's behalf, and that, as soon as the defendant was notified by the plaintiff that the plaintiff would claim compensation for the use of the fence, he ceased using it, a finding for the plaintiff is not warranted. *Ibid.*

Compare also *Jones* v. *Donnelly*, 213.

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FRAUD.

If a contract of subscription to a scholarship contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," a guarantor of the contract, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract. *International Textbook Co.* v. *Martin*, 1.

Although after the making of a common law assignment for the benefit of creditors continued possession by the assignor of the property assigned often is evidence of fraud, yet it is not conclusive evidence, and the circumstances may be such as to show that there was no fraud. *Cropper* v. *Gorham*, 119.

It here was stated as a recognized rule, that, in order that a transfer of property by a debtor to a purchaser for value but in fraud of creditors of the seller should be voidable by such creditors, the purchaser must actually have known of or have participated in the fraudulent purpose of the seller. *Cohen* v. *Levy*, 336.

At common law (under St. 13 Eliz. c. 5) and apart from statutory provisions a preference of one creditor by paying or securing an honest debt to him to the exclusion of others is not unlawful or voidable by or in behlf of the other creditors, if the sole object of the payment or transfer is to pay or secure the debt. *Lyon* v. *Wallace*, 351.

Suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy on the ground that the transfer was in fraud of creditors at common law, where it was held that the findings of a justice who heard the case did not establish any secret trust in relation to the property transferred to the bankrupt's wife in part payment of a legacy due to her, and that the bill must be dismissed. *Ibid.*

In such suit it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Ibid.*

In such suit the plaintiff was permitted to introduce in evidence, against the defendant's exception, the record of a writ of entry brought by certain creditors of the bankrupt in which it was found that a certain conveyance of land by the bankrupt to his wife within a few months of the present transaction was in fraud of creditors, such evidence being admissible as tending to show a general fraudulent purpose to put the property of the bankrupt out of the reach of his creditors. *Ibid.*

Suit in equity to set aside a building contract alleged to have been procured by fraud. *Winston* v. *Pittsfield*, 356.

General allegations of fraud, bias and prejudice of certain arbitrators, set forth in a declaration without specification of definite acts upon which they are based, are not enough to require judicial inquiry into the validity of an award made by the arbitrators. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

In sale of merchandise in bulk, see SALES OF MERCHANDISE IN BULK.

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FRAUDS, STATUTE OF.

An oral agreement that a surrender of a lease of land shall operate, as between the lessor and the lessee, as an assignment of the lease so that the lessor shall stand in the lessee's stead as to sublessees, is inoperative by reason of the provisions of R. L. c. 127, § 3. *Smith* v. *Abbott*, 326.

GRADE CROSSING.

Petition for damages resulting from a loss of view caused by the abolition of a grade crossing of a railroad with a highway. *Howell* v. *New York, New Haven, & Hartford Railroad*, 169.

GRANTING DEGREE WITHOUT AUTHORITY.

The giving without legislative authority by an incorporated "college of chiropractic" of a certificate naming the holder as a "Doctor of Chiropractic" is punishable under R. L. c. 208, § 75, as granting a degree "without the authority of a special act of the General Court granting the power to give degrees." *Commonwealth* v. *New England College of Chiropractic*, 190.

GUARANTY.

Where one in writing guarantees the payment of the price for a scholarship agreed by another person to be paid "in accordance with the terms of the within subscription," the contract of subscription is incorporated into the contract of guaranty. *International Textbook Co.* v. *Martin*, 1.

If a contract of subscription to a scholarship contains a provision, "Do not sign this subscription without reading it. It is subject to acceptance by the Company . . . and agents are not authorized to change its conditions," a guarantor of the contract, in an action against him after default by the subscriber, cannot rely on the defence that the subscriber was induced to sign the contract by false and fraudulent misrepresentations by an agent as to the meaning of a certain provision of the contract. *Ibid.*

Where, at the trial of an action upon a guaranty in writing, the defendant admits the execution of the agreement of guaranty and all the defences offered by the defendant are as a matter of law untenable and there is no question as to the amount due under the contract, it is proper to order a verdict for the plaintiff. *Ibid.*

GUARDIAN.

Ad Litem.

A guardian *ad litem* appointed by the court is entitled to have his expenses ordered to be paid out of the fund claimed by the litigants. *Goodrich* v. *Henderson*, 234.

Of Insane Person.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased

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wife could not be exercised before the enactment of St. 1915, c. 23, by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Jones* v. *Maguire*, 315.

Of Illegitimate Child.

The Legislature has power to authorize the appointment, as guardian of an illegitimate child with custody of the child's person, of some one other than the child's mother, although the mother is living. *Chambers's Case*, 178.

The Probate Court has jurisdiction to appoint as guardian of an illegitimate child a person other than the child's mother, although the mother is living. *Ibid.*

It was held to have been proper under the circumstances for a single justice of this court on the return day of the order of notice on a petition for a writ of habeas corpus seeking the discharge of an illegitimate minor from the custody of a guardian appointed by the Probate Court, to hear the parties without the issuance of the writ or the production of the minor for the purpose of ascertaining whether there was cause, *prima facie*, for the issuance of the writ, and after such hearing to dismiss the petition. *Ibid.*

Of Spendthrift.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry. *Sullivan* v. *Lloyd*, 108.

It seems that the presumptive heirs and next of kin of the spendthrift also are persons aggrieved by such a decree and have a right of appeal, but it was not necessary to decide this in the present case. *Ibid.*

The brother of a spendthrift who brought the petition on which the decree of guardianship was made is a person aggrieved by a decree of the Probate Court terminating the guardianship of the spendthrift by accepting the resignation of his guardian, and therefore under R. L. c. 162, § 9, such brother may appeal to the Supreme Judicial Court, thereby suspending the operation of the decree and leaving the spendthrift under guardianship. *Ibid.*

HABEAS CORPUS.

No appeal lies from a decision or order of a single justice of the Supreme Judicial Court dismissing a petition for a writ of habeas corpus. *Chambers's Case*, 178.

It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus. The usual method of bringing the question of the correctness of such rulings before this court is by a report or a reservation by the single justice, or an adjournment of the case into this court for determination. *Ibid.*

It was held to have been proper under the circumstances for a single justice of this court on the return day of the order of notice on a petition for a writ of habeas corpus seeking the discharge of an illegitimate minor from the custody of a guardian appointed by the Probate Court, to hear the parties without the issuance of the writ or the production of the minor for the purpose of ascertaining whether there was cause, *prima facie*, for the issuance of the writ, and after such hearing to dismiss the petition. *Ibid.*

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HIGHWAY.

See WAY.

HUSBAND AND WIFE.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, is a personal privilege and not a property right. *Jones* v. *Maguire*, 315.

And therefore before the enactment of St. 1915, c. 23, that right could not be exercised by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Ibid.*

Suit in equity by a trustee in bankruptcy to set aside a transfer by the bankrupt to his wife of certain shares of stock more than four months before the adjudication in bankruptcy on the ground that the transfer was in fraud of creditors at common law, where it was held that the findings of a justice who heard the case did not establish any secret trust in relation to the property transferred to the bankrupt's wife in part payment of a legacy due to her, and that the bill must be dismissed. *Lyon* v. *Wallace*, 351.

In such suit it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Ibid.*

ILLEGITIMACY.

As to the appointment of a guardian of an illegitimate child with custody of the child's person, see *Chambers's Case*, 178.

INCOME.

See CAPITAL AND INCOME.

INFANT.

Rights of infant in insurance placed by his father upon his life. *Burke* v. *Prudential Ins. Co. of America*, 253.

INQUEST.

Report of an inquest as evidence, see appropriate subtitle under EVIDENCE.

INSOLVENCY.

Validity under certain circumstances of an assignment by an insolvent debtor for the benefit of his creditors. *Cropper* v. *Gorham*, 119.

INSOLVENT ESTATE OF DECEASED PERSON.

See appropriate subtitle under EXECUTOR AND ADMINISTRATOR.

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INSURANCE.

Life.

Where a father made an application for an insurance policy on the life of his minor son and a policy was issued payable in case of the death of the son "unto the executors, administrators or assigns of the insured," and the father paid all premiums on the policy as they became due until the son became of age, it was held that the son was the insured. *Burke* v. *Prudential Ins. Co. of America*, 253.

It also was held that neither the father nor the mother was an owner of or a beneficiary under the policy, and, unless specially authorized by the insured, that neither of them had authority to surrender the policy to the insurer or to receive under its provisions in its stead a paid up policy. *Ibid.*

That therefore as between the insured and the insurer the policy was unchanged in legal effect by unauthorized acts of such a nature. *Ibid.*

Verdict was held properly to have been ordered for the defendant at the trial of an action for a breach of the contract, contained in an insurance policy issued by a corporation organized and incorporated in another State, where it appeared that by the provisions of the policy it had become invalid because of the non-payment of premiums and that thereafter the insured had made an application for the policy's revival according to its provisions and that, in the exercise of a right given to it by the policy, the corporation had refused to grant the revival. *Ibid.*

In an action by a woman, named as the beneficiary in an insurance policy and there designated as the "affianced" of the insured, against the company upon the policy, where the administrator of the estate of the insured was summoned as an adverse claimant, it was held that on the evidence a finding was warranted that a certificate and affidavit by the insured stating that the beneficiary was dead and that he was the sole owner of the policy were not intended by him to operate as a change of beneficiary; and that they did not so operate as a matter of law. *Crosby* v. *Mutual Benefit Life Ins. Co.* 461.

In the same action certain statements of the insured during his last illness, which tended to show that he did not intend to revoke the designation of the plaintiff as the beneficiary of his policy, were held to be admissible as the declarations of a deceased person under R. L. c. 175, § 66. *Ibid.*

And a declaration of the insured, "If anything does happen to me, I have had my life insured and Charlotte [the plaintiff] will have that anyway," which was admissible as showing his intention, was held to be a statement of fact and not incompetent as expressing an opinion on a past transaction. *Ibid.*

Fire.

The provisions of a policy of fire insurance in the Massachusetts standard form, relating to the submission to arbitration of the question of the amount of loss suffered from a fire within the terms of the policy, are valid. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

Under the provisions of a policy of fire insurance in the Massachusetts standard form, while a reference to arbitrators of the question of the amount of loss, as therein provided for in case the parties are unable to agree, is a con-

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dition precedent to a right of action upon the policy, the return of an award or the making of a valid award is not such a condition precedent. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

Where an agreement for arbitration between the insured and the insurer of the question of the amount of loss under the provisions of a policy of fire insurance in the Massachusetts standard form provides "that the provisions of" R. L. c. 194, §§ 6, 7, "shall apply as a part of the agreement for this submission," the arbitrators must hear and consider relevant evidence. *Ibid.*

If under such circumstances the arbitrators refuse to hear any evidence from the insured and give him no opportunity to present any evidence bearing on the question of his loss or damage occasioned by the fire, an award made by them is invalid. *Ibid.*

It seems, however, that such arbitrators at their hearings would not be bound by the strict rules of evidence, but might proceed by the summary methods implied in an arbitration. *Ibid.*

An allegation, in the declaration in an action of contract upon a policy of fire insurance in the Massachusetts standard form seeking to recover damages greater than the amount awarded by arbitrators to whom the question of the amount of the loss was referred under the terms of the policy, that no notice of hearings before the arbitrators was given to the insured by the arbitrators, is not sufficient to warrant the overruling of a demurrer to the declaration on the ground that such lack of notice made an award by the arbitrators invalid. *Ibid.*

If, after such an invalid award, the insured offers to proceed with a new arbitration but the insurer refuses to join therein and insists upon the validity of the award already made, the insured need not resort to a suit in equity for an adjudication of the invalidity of the award, but has an adequate remedy at law in an action upon the policy. *Ibid.*

In such an action he may prove the invalidity of the award and may recover the amount justly due him under the provisions of the policy; and the insurer, if he contends that the award is valid, may offer it in defence to the action. *Ibid.*

General allegations of fraud, bias and prejudice of such arbitrators, set forth in a declaration without specification of definite acts upon which they are based, are not enough to require judicial inquiry into the validity of an award made by the arbitrators. *Ibid.*

Mere inadequacy of an award by such arbitrators is no ground for setting aside the award if it was made honestly and without mistake. *Ibid.*

An allegation in the declaration in such action that the award made by the arbitrators was "grossly inadequate" was held not sustained by the allegations of the declaration. *Ibid.*

Under the provisions of a policy of fire insurance in the Massachusetts standard form, which was issued after the enactment of the provision of St. 1907, c. 576, § 57, that "if buildings insured against loss by fire, and situated within this Commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage" if the insured property is a "total loss," arbitrators as to the amount of the loss, appointed under the provisions of the policy, are warranted in refusing to take into account loss caused to the insured by the tearing down of a part of the walls of the building by mu-

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nicipal authorities at the expense of the insured or by the insured on the order of such authorities but for the safety of the public after the fire was under control but before it was extinguished, and an increased cost of rebuilding due to the fact that under certain building laws the insured must use more expensive materials. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

Accident.

Where a policy of accident insurance provided that the insurer's liability should be limited to a certain indemnity in case the insured changed his occupation to one rated as more hazardous and, at the trial of an action for indemnity under the policy, the insurer contended that the insured had made such a change, the burden of establishing that fact was held to be upon the insurer and, where the evidence was not undisputed, it was held to be proper for the presiding judge to refuse to rule that that burden was sustained. *Constantino* v. *Massachusetts Accident Co.* 464.

Where, at the trial of an action against an insurance company upon a policy of accident insurance, the defendant contended that the notice in writing of the plaintiff's injury required by the provisions of the policy was not given, it was held that, on evidence as to certain negotiations of the insured with an agent of the company, the question, whether such notice was given, properly was left to the jury. *Ibid.*

Where a policy of accident insurance requires that "proofs of claim on blanks furnished by the company must be filed with the company" and the blank forms are not annexed to the policy but are to be furnished as occasion calls, it cannot reasonably be said that it was in the contemplation of the parties that the insurer in the exercise of its right would demand of the insured a certificate of a kind which it was impossible to obtain. *Ibid.*

Accordingly, where it appears at the trial of an action upon such a policy that the blank, furnished to the insured after he had been injured while in the employ of a manufacturing corporation, required a certificate as to the circumstances from the insured, his physician and the employer, although the policy itself did not in terms require such a certificate, and that the employer refused to give such a certificate, if the insured furnished the certificates of himself and of his physician, it cannot be ruled as a matter of law that his failure to furnish that of his employer bars his recovery. *Ibid.*

At the trial of an action upon the policy of accident insurance which contained a provision that no indemnity should be paid if the death of the insured resulted from an injury "caused wholly or in part . . . by . . . voluntary exposure to unnecessary danger . . . nor for any injury which the" insured by the "exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which" his "own negligence shall have contributed," the burden of sustaining a defence under such provisions is on the defendant, and a verdict in its favor cannot be ordered. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

Where, at the trial of such an action, a case of death by violent and external means is made out by the evidence, there is a presumption of fact that the death was not intentional and that the injuries causing it were not self-inflicted. *Ibid.*

Therefore, although without such presumption the evidence might not be sufficient to warrant a finding that the cause of the death was wholly acci-

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dental, it cannot be ruled as a matter of law under such circumstances that the question, whether such cause was wholly accidental, should not be left to the jury. *Nichols* v. *Commercial Travellers' Eastern Accident Association*, 540.

It was held that a report of an inquest annexed to a letter, sent by the attorney of the beneficiary under a policy of accident insurance to the insurer and containing a statement of the claim of the indemnity, properly might be admitted in evidence at the trial of an action for the indemnity, not as evidence of the manner of death or its cause, but solely for the purpose of deciding whether the report, with the other information obtained by the insurer, ought to have satisfied the defendant that the cause of the death was an accident within the provisions of the policy. *Ibid.*

If a policy of accident insurance, which originally provided a death indemnity of not more than $5,000, was afterwards amended to provide that, in case of the death of the insured "while riding as a passenger on a passenger train, and inside a passenger car thereof," the amount to be paid should "not exceed $10,000," and the insured thereafter met his death by falling through a window of a sleeping car on a passenger train, the beneficiary under the policy, if entitled to recover at all, may recover $10,000. *Ibid.*

At the trial of an action upon a policy of accident insurance providing for the payment to the plaintiff of a certain sum in the event of the death of the insured "wholly and entirely by external, violent, and accidental means," where it appeared that in some way the insured went through a window from a sleeping car berth, it was held that on all the evidence a finding was warranted that the insured met his death by external, violent and accidental means. *Ibid.*

INTENT.

Proof of, see EVIDENCE, *Of Intent.*

INTEREST.

In an action of contract for the price of certain merchandise furnished by the plaintiff under a contract in writing, where by the terms of the contract the agreed price for cash shipments was to be due thirty days thereafter, it seems, that the plaintiff, if entitled to recover, can recover interest computed on the amount due for each shipment from the expiration of such thirty days without showing any demand for payment. *Fillmore* v. *Johnson*, 406.

INTOXICATING LIQUORS.

Under St. 1906, c. 291, § 4, the fees paid by licensees under R. L. c. 100, § 10, to the secretary of the licensing board of the city of Boston as the recording officer for recording each license must be paid into the city treasury. *Boston* v. *Epple*, 395.

It was held that one to whom the trustee in bankruptcy of the holder of a license of the first class to sell intoxicating liquors on certain premises in Boston, and to whom on that day the board issued a first class license and who thereafter held such a license for less than two years had not "held a license for the sale of intoxicating liquors upon said premises . . . for the two years next preceding the date of his application," within the

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meaning of R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, and therefore that under the provisions of that section the licensing board must refuse to grant the application where an owner of real estate within twenty-five feet duly objected in writing. *Adams* v. *Licensing Board of Boston*, 429.

Whether a petition for a writ of certiorari is the proper method of bringing to this court the legality of a refusal by the licensing board of Boston under R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, to grant an application for a license for the sale of intoxicating liquors, was not decided in this case, where the petition was dismissed upon its merits. *Ibid.*

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JOINT TORTFEASORS.

An accord between a plaintiff and one of two joint tortfeasors, without satisfaction, is not a bar to an action against the other joint tortfeasor. *White* v. *Beverly Building Association*, 15.

A mere entry, by agreement of the parties in an action of tort against one of two joint tortfeasors, of "Neither Party, no further suit to be brought for the same cause of action" is not an adjudication of the case nor a release and discharge of the defendant and does not operate to discharge the other joint tortfeasor from liability. *Ibid.*

Evidence, that the plaintiff in an action of tort against one of two joint tortfeasors agreed to an entry in the action of "neither party" and that no further action should be brought for the same cause, upon the promise of an insurance company which had insured the defendant against the liability that it would pay to him $250, and that no part of that amount had been paid, will not warrant a finding of an accord and satisfaction that will bar an action by the plaintiff against the other joint tortfeasor. *Ibid.*

One who has suffered injury or damage by reason of a tort of a partnership may elect to bring an action of tort against all the partners jointly or to bring a separate action against each partner. *Contakis* v. *Flavio*, 259.

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Ibid.*

It was held that a suit in equity could not be maintained to enjoin the enforcement of an alias execution, irregularly issued in an action at law, against one of two joint tortfeasors, but that the defendant's remedy was to bring forward the original action against it and to move to set aside the alias execution for irregularity. *Boston & Maine Railroad* v. *D'Almeida*, 380.

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JUDGMENT.

A mere entry, by agreement of the parties in an action of tort against one of two tortfeasors, of "Neither Party, no further suit to be brought for the same cause of action" is not an adjudication of the case nor a release and discharge of the defendant and does not operate to discharge the other joint tortfeasor from liability. *White* v. *Beverly Building Association*, 15.

Whether, in an information in equity under St. 1909, c. 266, § 1, and St. 1909, c. 490, Part IV, §§ 19, 20, a decree of the Probate Court allowing the account of the defendant as administrator in which the payments of the debts of his intestate were stated, the decree having been entered without any notice to the Commonwealth, is binding upon the Attorney General, it was unnecessary to determine, because the amount of the payments made by the defendant as administrator was not in dispute. *Attorney General* v. *Laycock*, 146.

Where a foreman suspended for this cause filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision. *Gardner* v. *Lowell*, 150.

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

A judgment in an action of tort against all the members of a partnership is an entirety and is indivisible. *Contakis* v. *Flavio*, 259.

If, upon the petition of one of the defendants in an action of tort against all the members of a partnership jointly, a judgment obtained in that action is vacated, it is vacated against all the defendants and all remedies for its collection against the several defendants are discharged. *Ibid.*

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Ibid.*

R. L. c. 168, § 66, requires that in an action for the breach of a poor debtor's recognizance, if a breach is proved, "judgment shall be entered for the amount of the penalty," and accordingly in such an action the trial judge must refuse a request of the defendant to rule that judgment should be entered for the plaintiff for nominal damages only. *American Stable Co.* v. *Clarke*, 271.

Whether an interlocutory order of the Superior Court, made upon a petition under St. 1909, c. 514, § 141, of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, is a "judgment founded upon matter of

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law apparent on the record in any proceeding," from which an appeal to this court can be taken under St. 1906, c. 342, § 2, it here was not necessary to decide. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

It also was unnecessary to decide whether, in a case where no exceptions were taken, an appeal from such an interlocutory order would stay the entry of judgment. *Ibid.*

JURISDICTION.

See EQUITY JURISDICTION; PROBATE COURT; LAND COURT; SUPERIOR COURT.

LABOR UNION.

Discussion by DE COURCY, J., of the test of the legality of strikes and their relation to labor unions. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

The Superior Court is not deprived of its jurisdiction in equity to remove clouds upon titles by the provisions of St. 1904, c. 448, conferring exclusive and original jurisdiction upon the Land Court both in law and equity of petitions under R. L. c. 182, §§ 11–14, inclusive, to determine the validity of certain incumbrances. *McArthur* v. *Hood Rubber Co.* 372.

Nor is the remedy granted by those sections so adequate and complete as to exclude general equity jurisdiction of the subject. *Ibid.*

The provision of St. 1905, c. 288, regarding a report by the judge of the Land Court of his decision, in case of an appeal from the Land Court to the Superior Court for a jury trial on the facts, and the use of the report as evidence, so far as it relates to the effect of the report is a rule of evidence and findings contained in such a report which are based on extrinsic evidence that should not have been admitted to affect the construction of a clear description in a deed have no probative force. *Pollard* v. *Ketterer*, 317.

LANDLORD AND TENANT.

What constitutes Relation.

A certain agreement by the owner of a building "to let to" a certain bill poster "the location of roof" on the building was held not to create a relation of landlord and tenant between the owner and the bill poster, but to be merely a contract concerning a permit or license for the use of the roof. *Jones* v. *Donnelly*, 213.

Therefore, after use of the premises by the bill poster, neither the owner nor one to whom he conveys his rights in the premises can maintain against the bill poster by reason of the agreement an action for use and occupation of the premises. *Ibid.*

The mere use of the word "let" in an agreement granting a right or privilege to occupy a roof for bill posting purposes does not make the agreement a lease nor create the relation of landlord and tenant between the parties to the agreement. *Ibid.*

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Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, was a tenant or licensee, was not passed upon. *Stevenson* v. *Donnelly*, 161.

Tenancy at Sufferance.

Where a tenant at will of real estate by reason of a conveyance of the premises by the landlord becomes a tenant at sufferance, he is not liable for rent until he has notice of the conveyance. *Jones* v. *Donnelly*, 213.

Construction of Lease.

For the purpose of determining the scope and effect of a provision in a lease, the lease is to be construed as of the date when it was made. *Goldsmith* v. *Traveler Shoe Co.* 482.

In a provision in a lease of the first floor of a building, "The lessor will supply light, heat, elevator service and space," the word "space" by reason of its indefiniteness does not convey the right to use any part of the basement of the building as part of the demised premises. *Ibid.*

At the hearing of a suit in equity to enjoin the defendant from occupying a portion of the basement of the plaintiff's building under such a lease, it was held that, on findings of the judge that there was no agreement by the lessor before the making of the lease to furnish space in the basement, that such space was not necessary to the defendant's business, and that a permission given to the defendant to use a portion of the basement "was a license and was revocable," a decree for the plaintiff was warranted. *Ibid.*

A lease of the third floor of a six story building "with the exception of the staircases and elevator wells," which is "a lease of the floor space only," cannot be interpreted to mean that the lessee has control of a gate placed at the well of a freight elevator to prevent persons from falling down the well when the elevator is not there, which has to be raised by a person getting out of the elevator at that floor and is designed to slide back to the floor after the elevator has passed away from it. *Follins* v. *Dill*, 93.

A covenant in a lease of the third floor of a six story building "with the exception of the staircases and elevator wells," that "the lessee will defend any law suit and pay any claim or damage arising from any accident or accidents to any person, persons or property in consequence of his occupancy of the herein leased premises," does not protect the lessor against direct liability to one injured through his negligence in regard to an elevator well of the building which is not leased to the tenant nor within the tenant's control. *Ibid.*

Terms of Oral Letting shown by Conduct.

Where, in an action involving the duties of the proprietor of a tenement house toward one of his tenants, the contract of letting does not appear to have been in writing and there is no direct and positive evidence as to its terms, the conduct of the landlord and of the tenant, so far as the conduct of each was so open and notorious that it must have been known to the other, may be resorted to for the purpose of determining the terms of the tenancy according to the intention and contemplation of the parties. *Gallagher* v. *Murphy*, 363.

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Oral Agreement as to Effect of Surrender of Lease.

An oral agreement that a surrender of a lease of land shall operate, as between the lessor and the lessee, as an assignment of the lease so that the lessor shall stand in the lessee's stead as to sublessees, is inoperative by reason of the provisions of R. L. c. 127, § 3. *Smith* v. *Abbott*, 326.

Liability of Tenant for Use and Occupation.

To recover in an action for the use and occupation of real estate the plaintiff must prove that the relation of landlord and tenant existed between him and the defendant. *Jones* v. *Donnelly*, 213.

Partial Eviction.

Where the owner of a building, after giving to a tenant a lease of one of the floors of the building, closes an entrance of the building on a business street which existed when he gave the lease and substitutes another entrance equally convenient to the lessee through a building which the lessor does not own, and later the owner of the substituted entrance closes its connection with the tenant's premises, the lessee may maintain a suit in equity to enjoin the lessor from evicting him from the use of the substituted entrance and for damages, and the lessor is estopped to deny the existence of the substituted entrance as a part of the demised premises and as against the plaintiff cannot show title in another to relieve himself from liability. *Epstein* v. *Dunbar*, 579.

In the same case it was held, that the partial eviction did not necessarily terminate the lease, so that it was not essential that the tenant should abandon the entire premises before seeking relief in equity. *Ibid.*

In the case stated above the defendant, not having in fact the title to such substituted entrance, cannot be required to reopen the entrance which he does not control, and must respond in damages. *Ibid.*

Landlord's Liability in Tort.

On the evidence at the trial of an action against the owner of a building by a woman employee of a tenant on the fourth floor of the building for personal injuries caused by the plaintiff falling down a flight of steps in a stairway used in common by all the tenants in the building because a hand rail maintained there by the defendant came out of its bracket when it should have supported the plaintiff, it was held that findings were warranted that the plaintiff was in the exercise of due care and that the defendant was negligent. *White* v. *Beverly Building Association*, 15.

Owner of a building was held not to be liable for the death of one, who was invited upon the premises by a tenant and was killed because he stepped into an open freight elevator well, both because the tenant's lease provided that the freight elevator should not be used except for freight and because an alleged custom only permitted persons to use that elevator when they were travelling with freight. *Follins* v. *Dill*, 93.

Evidence which was held to warrant a finding that the owner of a six story building was liable for causing the death of a person, to whom he owed a duty greater than that owed to a mere licensee or trespasser, caused by

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such person's falling into a freight elevator well because a protecting gate failed to lower itself owing to a defective condition. *Follins* v. *Dill*, 93.

One who is in a building by the invitation of a tenant has no greater right of recovery against the owner of the building for personal injuries suffered by him by reason of the condition of the premises than the tenant would have if he were so injured. *Mackey* v. *Lonergan*, 296.

In an action for personal injuries suffered when the plaintiff, in entering a building in a city owned by the defendant at the invitation of one who was a tenant at will of the defendant under an agreement which gave entire control of the premises to the tenant and required him to make all ordinary repairs, fell down an unguarded flight of stairs, it was held that upon the evidence there could not have been any recovery by the tenant if he had been injured as the plaintiff was, and that therefore the plaintiff could not recover. *Ibid.*

The foregoing result was held not to be affected by the facts that the stairway was constructed as it was in violation of a permit of the building department and of an ordinance of the city and that, if it had been constructed in accordance with the permit issued to the defendant, it would not have been dangerous; that such construction had been done before the beginning of the tenancy of the person by whose invitation the plaintiff was on the premises, and that the premises had not been changed since. *Ibid.*

Evidence in an action against the proprietor of a tenement house by the mother of one of the defendant's tenants for personal injuries sustained by falling down a stairway after she had left the apartment of her son in the evening, thinking that a gas jet was lighted in the hallway when it was not, was held to warrant a finding that the plaintiff was in the exercise of due care. *Gallagher* v. *Murphy*, 363.

It seems that, in the absence of any express or implied agreement or a statutory requirement, the proprietor of a tenement house, who is in control of the stairways and common passageways, is under no obligation to his tenants to light the hallways. *Ibid.*

In such action it also was held that the question of the defendant's negligence is for the jury. *Ibid.*

A landlord, who gratuitously promises a tenant that he will make certain repairs upon the demised premises and makes such repairs negligently, although he is liable for injuries to his tenant caused by such negligence, is not liable for an injury to an invitee of the tenant to whom the gratuitous promise was not made and to whom the landlord owed no duty in the matter. *Thomas* v. *Lane*, 447.

LEGACY.

See DEVISE AND LEGACY.

LEGITIMACY.

Guardianship of illegitimate child, see *Chambers's Case*, 178.

LETTER.

It was held that the testimony in an action of contract relating to a letter purporting to have been dictated by a witness, whom the defendant was

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Letter (*continued*).

seeking to impeach, which was typewritten on paper with the heading of the witness's firm and was signed in typewriting in the name of the witness, required that the letter be admitted in evidence in order that the jury might pass upon the question whether the witness dictated it so that, if they found that he did, they might consider it upon the question of the witness's credibility. *Slotnick* v. *Silberstein*, 59.

In an action for a breach of an alleged contract, a mere acknowledgment of the receipt of a certain letter from an attorney for the plaintiff and the referring of the writer to an attorney at law were held not to make the letter thus received admissible in evidence against the defendant. *Smith* v. *Abbott*, 326.

And this was especially true because the letter contained self-serving statements of the plaintiff's views of the relations of the parties and was introduced to show a ratification by the defendant of an unauthorized agreement made by his attorney. *Ibid.*

In an action brought by a millowner against his customer on a contract for furnishing to the defendant the entire product of the plaintiff's mill, it was held that a certain letter sent by the plaintiff to the defendant when they were at issue as to the actual cost of finishing, in which, because of the position taken by the defendant, the plaintiff said, "we will ask you to secure your requirements elsewhere at the earliest possible moment we will in the meantime try and take care of your orders," did not estop the plaintiff from claiming damages from the defendant for not taking paper after its date, it appearing that the plaintiff was right as to the price insisted upon by him. *Fillmore* v. *Johnson*, 406.

LICENSE.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

Rights of licensed common victualler as to sale of food on Sunday. *Commonwealth* v. *Meckel*, 70.

Whether one, who used a fence on land of another for advertising purposes under a certain agreement with the landowner permitting him to do so for an agreed compensation, was a tenant or licensee, was not passed upon. *Stevenson* v. *Donnelly*, 161.

R. L. c. 76, § 8, providing penalties for practicing medicine within this Commonwealth without a license is constitutional. *Commonwealth* v. *Zimmerman*, 184.

The provisions of R. L. c. 76, § 9, excluding persons practicing certain methods of healing from the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered, does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws. *Ibid.*

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One who calls himself a chiropractor and, without a license to practice medicine, is engaged in the practice of chiropractic, which "is the specific science that removes pressure upon the nerves by the adjustment of spinal vertebrae" by hand only without the use of instruments, may be found guilty of practicing medicine without a license within the meaning of R. L. c. 76, § 8. *Commonwealth* v. *Zimmerman*, 184.

Under St. 1906, c. 291, § 4, the fees paid by licensees under R. L. c. 100, § 10, to the secretary of the licensing board of the city of Boston as the recording officer for recording each license must be paid into the city treasury. *Boston* v. *Epple*, 395.

To operate an automobile, see AUTOMOBILE, *Operator's license.*

LICENSING BOARD OF THE CITY OF BOSTON.

Under St. 1906, c. 291, § 4, the fees paid by licensees under R. L. c. 100, § 10, to the secretary of the licensing board of the city of Boston as the recording officer for recording each license must be paid into the city treasury. *Boston* v. *Epple*, 395.

The licensing board therefore have no power to direct by vote, "That the secretary need not turn over any more recording fees to the city." *Ibid.*

Whether a petition for a writ of certiorari is the proper method of bringing to this court the legality of a refusal by the licensing board of Boston under R. L. c. 100, § 15, as amended by St. 1906, c. 287, § 1, to grant an application for a license for the sale of intoxicating liquors, was not decided in this case, where the petition was dismissed upon its merits. *Adams* v. *Licensing Board of Boston*, 429.

LORD'S DAY.

One who is licensed as a common victualler under R. L. c. 102, §§ 1–22, has no right to sell any kind of food on the Lord's day to be taken and carried away, where such sale is not a work of necessity or charity, and, if he does so, he may be convicted and punished under R. L. c. 98, §§ 2, 3. *Commonwealth* v. *Meckel*, 70.

Assuming that a common victualler, although by R. L. c. 102, § 8, he is not required to keep his place of business open on the Lord's day, lawfully may do so for the purpose of supplying his customers with food to be eaten upon his premises, this gives him no right to sell on that day any food to be carried away. *Ibid.*

Where a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited is less than a week, Sunday is excluded. *Stevenson* v. *Donnelly*, 161.

In computing the "six days after the entry of the judgment" within which, by the provisions of R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, a person aggrieved by a judgment of a municipal court in a civil action may appeal to the Superior Court, Sunday is excluded. *Ibid.*

In the same statute, the word "days" means entire days, and an appeal perfected at any time during the sixth day, exclusive of Sunday, although not within the sixth secular period of twenty-four hours, is effectual. *Ibid.*

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LOWELL.

The provision of St. 1911, c. 624, relative to a review in the police, district or municipal court of the removal, lowering in rank or compensation, or suspension of certain persons "appointed to an office classified under the civil service rules of the Commonwealth," was held to apply clearly to the indefinite suspension by the commissioner of streets and highways of Lowell of a foreman of laborers in the street department of that city. *Gardner* v. *Lowell*, 150.

Acts of the commissioner of streets and highways of Lowell in keeping in the safe in his office a copy of the papers relating to the removal or suspension of a subordinate in his department, and in causing such papers temporarily to be removed to a police court for the purposes of the hearing of a petition of such subordinate for a review of the order for his removal or suspension were held to have been proper under the provisions of the city's charter and to have been not a violation of but a compliance with the requirement of St. 1904, c. 314, § 2, that in case of such a suspension or removal "a copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record." *Ibid.*

MALICIOUS INTERFERENCE.

In an action by a workman in a shoe factory against a corporation doing a retail clothing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant, testimony of the plaintiff, that he was discharged by the foreman who said the superintendent "told me to let you go," while not strictly competent as to the alleged statement made by the superintendent to the foreman, was held not to have affected injuriously the substantial rights of the defendant. *Kennedy* v. *Hub Manuf. Co.* 136.

In the same case it was held that on the evidence a finding was warranted that the cause of the plaintiff's discharge was the act of the defendant in wrongfully causing the service upon the plaintiff's employer of a copy of the alleged assignment of the plaintiff's wages. *Ibid.*

In the same case it was held that testimony as to the average wages of those employed in the shop of the plaintiff's employer in the same work in which the plaintiff was employed was competent as tending to show the rate of compensation to which the plaintiff might have attained but for his discharge, there being other evidence that the plaintiff at the time of his discharge was receiving almost as much as such average. *Ibid.*

In the same action it was held that evidence was admissible in the cross-examination of a witness, who was the predecessor in title of the defendant, for the purpose of attempting to refresh his recollection, that three years before the defendant was incorporated the witness had caused to be served upon another employer of the plaintiff a copy of an assignment of his wages under the same power of attorney. *Ibid.*

And for this purpose a letter to the witness, which he has acknowledged receiving, in regard to this subject is competent. *Ibid.*

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Also the fact that two assignments of the plaintiff's wages were executed under a power of attorney that authorized an execution of "an assignment" has a possible bearing upon the issue of malice. *Kennedy* v. *Hub Manuf. Co.* 136.

MALICIOUS PROSECUTION.

At the trial of an action for malicious prosecution of the plaintiff on the charge of larceny, evidence, offered to show another cause for a loss of patronage in the plaintiff's business and relating to an indictment, trial and acquittal of the plaintiff on the charge of abortion four years after the alleged malicious prosecution, properly was excluded as too remote. *Reed* v. *Kimball*, 481.

MANDAMUS.

The common law right of a stockholder in a corporation to inspect the books and records of the corporation is a qualified and not an absolute one, and the issuing of a writ of mandamus for its enforcement is discretionary. *Klotz* v. *Pan-American Match Co.* 38.

But the remedy of a stockholder in a foreign corporation having its usual place of business in this Commonwealth, who has been deprived of his common law privilege of examining the books and records of the corporation, is a writ of mandamus. *Ibid.*

Writ of mandamus was issued to enforce such a right although a by-law of the corporation, not specifically authorized by a statute of the State of incorporation, purported to restrict the right within limits set by the board of directors. *Ibid.*

MARRIAGE AND DIVORCE.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry. *Sullivan* v. *Lloyd*, 108.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

See Agency; Negligence, *Employer's Liability;* Workmen's Compensation Act.

MILK.

The provision of R. L. c. 56, § 55, which prohibits having in possession with intent to sell milk to which water has been added, is violated by having in possession with such intent cream, separated from the milk by a centrifugal process, to which water has been added. *Commonwealth* v. *Elm Farm Milk Co.* 68.

MINOR.

See Infant.

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MISTAKE.

See EQUITY JURISDICTION, *To set aside Contract because of Mutual Mistake.*

MORTGAGE.

What constitutes.

An instrument of trust which provided that, because of the pendency in the United States Supreme Court of two suits in which no supersedeas bonds had been given, "and for other reasons," the grantor sold and conveyed to the trustee with full power to hold it, to sell it when in his discretion it was good business judgment to do so to fulfil certain business obligations of the creditor, and, at the termination of the pending litigation, to convert the property into cash and to distribute it substantially in accordance with the provisions of the national bankruptcy act to such creditors as assented to the provisions of the trust, paying the balance, if any, to the grantor, was held to be an assignment for the benefit of creditors and not a mortgage or pledge. *Collector of Taxes of Boston* v. *New England Trust Co.* 384.

Of Real Estate.

It was held that a mortgage of real estate properly was delivered although certain of the mortgagees did not know until long after the mortgage was made that it had been taken in their behalf, if the beneficial owner of the property, who was one of two trustees that were named as mortgagees, had authority to act to accept the mortgage both as trustee and as the agent of the other mortgagees and accepted it for all. *Hanson* v. *Griswold*, 228.

Under the circumstances appearing in a suit to enjoin the foreclosure of a mortgage of real estate, it was held that representations of the former beneficial owner of the land, who as agent had procured the execution of the mortgage to the defendants, that he had authority to cause the land to be conveyed to the predecessor in title of the plaintiff and that no other mortgage had been made, did not estop the defendants from proceeding with the foreclosure of their mortgage. *Ibid.*

If the holder of a third mortgage of real estate in a notice of a sale in foreclosure of his mortgage states more than the facts recited in his mortgage as to the condition of the debts secured by the first and second mortgages and undertakes to make a statement as to the present amount due on either of those debts, he does so at his peril. *Russell* v. *Bon*, 370.

Such a notice which was held to make a foreclosure sale voidable by the owner of the equity of redemption. *Ibid.*

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

In an action by a workman against his employer for personal injuries caused by the falling of an elevator by reason of the breaking of a wire cable and the failure to work of a safety clutch, evidence is not admissible that the defendant failed to notify the superintendent of public buildings of the accident as required by an ordinance of the city in which the accident happened. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

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Officers and Agents.

Acts of the commissioner of streets and highways of Lowell in keeping in the safe in his office a copy of the papers relating to the removal or suspension of a subordinate in his department, and in causing such papers temporarily to be removed to a police court for the purposes of the hearing of a petition of such subordinate for a review of the order for his removal or suspension were held to have been proper under the provision of the city charter and to have been not a violation of but a compliance with the requirement of St. 1904, c. 314, § 2, that in case of such a suspension or removal "a copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record." *Gardner* v. *Lowell*, 150.

Where a foreman suspended for this cause filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision. *Ibid.*

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

Determination of Population.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

Construction and Maintenance of Bridges.

It is within the constitutional power of the Legislature to impose upon one city or town a part of the expense of erecting or maintaining a bridge within the limits of another city or town. *Boston, petitioner*, 468.

MUNICIPAL COURT.

See Police, District and Municipal Courts.

NEGLIGENCE.

Due Care of Plaintiff.

Of an employee of a tenant in a building in using a hand rail in a stairway. *White* v. *Beverly Building Association*, 15.

Of elderly woman who fell into a trench dug in a public sidewalk. *Dolan* v. *Charles J. Jacobs Co.* 256.

Of a woman who, in boarding an elevated train, fell between the station platform and the car. *Harrington* v. *Boston Elevated Railway*, 299.

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In an action at common law for personal injuries sustained by reason of the wilful and reckless misconduct of the defendant in setting his dog on the plaintiff when he was a trespasser on the defendant's premises, it is not necessary for the plaintiff to allege or prove that he was in the exercise of due care. *Zink* v. *Foss*, 73.

It is not necessarily negligent for a woman who is entering a store through a revolving door to fail to take hold of one of the brass railings with which each wing of the door is equipped. *Norton* v. *Chandler & Co. Inc.* 99.

The evidence in an action against the proprietor of a tenement house by the mother of one of the defendant's tenants for personal injuries sustained by falling down a stairway after she had left the apartment of her son in the evening, thinking that a gas jet was lighted in the hallway when it was not, was held to warrant a finding that the plaintiff was in the exercise of due care. *Gallagher* v. *Murphy*, 363.

Due Care of Plaintiff's Decedent.

Of one who walked into an elevator well because a gate was not down. *Follins* v. *Dill*, 93.

Of a passenger on an ocean going steamship, who was thrown overboard where there was no guard chain or railing when the ship gave a lurch. *Hanley* v. *Eastern Steamship Corp.* 125.

Of a workman in a street who was struck by a street railway car as he was stooping to arrange some planks by the side of the rails. *McCue* v. *Boston Elevated Railway*, 432.

Of one riding as a guest on a tip cart which was run into by a street car at a corner. *Gaffney* v. *Bay State Street Railway*, 457.

Assumption of Risk.

By employee, see that subtitle under *Employer's Liability, post.*

There was held under the circumstances to be no assumption of risk as a matter of law by a passenger on an ocean going steamship, who was thrown overboard where there was no guard chain or railing when the ship gave a lurch. *Hanley* v. *Eastern Steamship Corp.* 125.

Employer's Liability.

Assumption of risk by employee.

Evidence in an action against a corporation called a laboratories company by a child seventeen years of age employed in the defendant's rat poison filling department in a basement for illness and suffering alleged to have been caused by being poisoned, which was held to warrant the jury in finding that the plaintiff failed to understand the danger to which she was exposed, and that, although the conditions were known, the danger involved was not obvious and the plaintiff did not assume the risk of the injury she suffered. *Thompson* v. *United Laboratories Co.* 276.

St. 1909, c. 363, § 1, which provides that "If a defect in the ways, works or machinery of a person, partnership or corporation, has been reported to the person whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence, and such defect is not remedied within a reasonable time, and by reason of said defect an employee is injured, such

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employees shall not be held to have assumed the risk of such injury," is not to be interpreted to apply to a case where the report of the defect to the employer was made before the injured workman was employed. *Shea* v. *American Hide & Leather Co.* 282.

It seems that, to bring a case within the statute quoted above, the report of the defect must have been made by the injured employee himself or in some way in his behalf. *Ibid.*

Ways, works or machinery.

An action under the employers' liability act against a street railway company for the death without conscious suffering of a lineman employed by the defendant alleged to have been caused by a defect in the ways, works, appliances and mechanism used in connection with the defendant's business cannot be maintained on those allegations where it appears that the cause of the death was the breaking of a guy pole while the deceased was working upon it and the evidence does not warrant a finding that the pole belonged to the defendant. *MacLellan* v. *Boston Elevated Railway*, 20.

Evidence in such an action which was held not to warrant a finding that the pole belonged to the defendant although there was evidence tending to show that after the pole was broken it was carried away on a team of the defendant. *Ibid.*

St. 1909, c. 514, § 141, which re-enacted St. 1908, c. 380, applies to injuries for which the remedy is at common law as well as to injuries that give a right of action under the employers' liability act. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

Whether an interlocutory order of the Superior Court, made under St. 1909, c. 514, § 141, upon a petition of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, is a "judgment founded upon matter of law apparent on the record in any proceeding," from which an appeal to this court can be taken under St. 1906, c. 342, § 2, it here was not necessary to decide. *Ibid.*

It also was unnecessary to decide whether, in a case where no exceptions were taken, an appeal from such an interlocutory order would stay the entry of judgment. *Ibid.*

In an action by a workman against his employer for personal injuries caused by the falling of an elevator by reason of the breaking of a wire cable and the failure to work of a safety clutch, evidence is not admissible that the defendant failed to notify the superintendent of public buildings of the accident as required by an ordinance of the city in which the accident happened. *Ibid.*

Superintendence.

A foreman in charge of a number of linemen of a street railway company in giving to a lineman of sixteen years' experience an order not in itself negligent to go upon a certain wooden pole called a "guy stub" pole to remove a guy from it, is under no duty first to inspect the pole and to give a warning or instructions as to how the work should be done. *MacLellan* v. *Boston Elevated Railway*, 20.

And, if he fails to make such inspection and to give any such warning or in-

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struction and the employee is injured by the breaking of the pole because of a decayed condition, the company cannot be held liable for the injuries by reason of negligence on the part of the superintendent, whether the company owned the pole or not. *MacLellan* v. *Boston Elevated Railway*, 20.

Under the circumstances described in the foregoing case, it was held that a witness for the plaintiff, qualified as an expert, need not be permitted to testify as to what was a proper method for the employee to use, because such evidence was immaterial and properly might be excluded. *Ibid.*

In that case the witness was permitted to state that the method adopted by the employee was improper, and it therefore was held that, if the evidence as to the proper method was competent for any purpose, the plaintiff was not harmed by its exclusion. *Ibid.*

Dangerous and defective machinery and appliances.

Evidence at the trial of an action by an administrator under St. 1909, c. 514, §§ 127, 128, and at common law for negligently causing the suffering and death of the plaintiff's intestate when in the defendant's employ before the workmen's compensation act took effect when the cylinder of a defective drum-setting machine flew out and struck the intestate on the head and chest, upon which it was held that the plaintiff was entitled to go to the jury. *Shea* v. *American Hide & Leather Co.* 282.

At the trial of the action above described it was error, at least as applying to the common law counts of the declaration, for the presiding judge to refuse a request of the defendant to rule that the defendant owed the plaintiff's intestate no duty to change or improve the condition of the machine on which the intestate was set at work and that the defendant's only duty to him was to warn him in regard to any dangers in connection with the use of the machine that were not obvious. *Ibid.*

In an action by a painter, against a corporation employing him to do outside work, for personal injuries caused by the fall of a staging on which he was set at work to paint window frames of a building of the defendant, evidence of a defective condition of the staging and its cause was held to warrant the submission of the question of the defendant's negligence to the jury. *Blohm* v. *Boston Elevated Railway*, 390.

In the case above stated, it was held that the mere facts that before and at the time of the accident workmen on the inside of the building, who were employed by an independent contractor, were engaged in throwing lumber through the window to the ground, still left for the jury the question as to what they should find caused the plaintiff's injury. *Ibid.*

Dangerous place.

In an action by a longshoreman against a steamship company by which he was employed for personal injuries resulting from the falling upon him of a box, it was held that there was no evidence that the fall of the box was caused by the negligence of the defendant or of its servants and that a verdict properly was ordered for the defendant. *Morris* v. *Eastern Steamship Corp.* 306.

Dangerous occupation.

Evidence in an action against a corporation called a laboratories company, by a child seventeen years of age employed in the defendant's rat poison filling department in a basement for illness and suffering alleged to have

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been caused by being poisoned, which was held to warrant the jury in finding that the plaintiff failed to understand the danger to which she was exposed, and that, although the conditions were known, the danger involved was not obvious and the plaintiff did not assume the risk of the injury she suffered. *Thompson* v. *United Laboratories Co.* 276.

In the case above stated, it also was held that it could be found that the defendant was negligent in failing to warn the plaintiff that she might be poisoned by inhaling the dust from the volatile mixture she was told to put into cans, and that the defendant should have foreseen that injury in some form at some time probably would occur to some one engaged in what might be found to have been a business dangerous to the persons employed. *Ibid.*

Liability of employer not subscriber under workmen's compensation act.

Action by one employed as machinist in a factory of the defendant for personal injuries from a freight elevator being put in motion by a fellow workman when the plaintiff was sitting on the sill of a doorway of the elevator well on the ground floor and was engaged in directing repairs on the elevator well above him, where it appeared that the accident happened after the workmen's compensation act was in force and that the defendant was not a subscriber under the act and on the evidence it was held that the question of the negligence of the defendant and of his employees was for the jury. *Pope* v. *Heywood Brothers & Wakefield Co.* 143.

Independent contractor.

In an action by an employee against his employer for personal injuries it was held that certain evidence as to acts of employees of an independent contractor which might have caused the plaintiff's injury still left for the jury the question, whether the defendant's negligence caused it. *Blohm* v. *Boston Elevated Railway*, 390.

Street Railway.

It was held that, at the trial of an action of tort by an administrator against a street railway company for causing the death of a workman in a wide street in a city, where it appeared that, as the plaintiff's intestate had stooped down in arranging some planks near street railway rails, his head was struck by a street car which passed at the rate of about twenty-two miles an hour and of the approach of which no sound of warning was given, there was evidence that the intestate was in the exercise of the due care required by St. 1907, c. 392, as a condition precedent to recovery, and that the motorman was negligent. *McCue* v. *Boston Elevated Railway*, 432.

At the trial of the action described above evidence as to a practice of the defendant of running its cars slowly and of striking the gong continuously while passing through an area where repairs were being made was admissible, not only to show how the cars were run, but also to show that the intestate knew of the usual method and presumably governed his conduct accordingly. *Ibid.*

At the trial of an action against a street railway company by an administrator for the benefit of the next of kin of his intestate to recover the statutory penalty imposed for negligently causing the death of the intestate (before the enactment of St. 1914, c. 553), when the intestate by the invitation of

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the owner of a tip cart was sitting with such owner and another guest on a board placed as a seat across the tip cart, which was run into by a street car of the defendant at the corner of two streets, there was evidence for the jury that the intestate was actively looking out for his personal safety and thus was in the exercise of due care within the meaning of the statute. *Gaffney* v. *Bay State Street Railway*, 457.

Facts which it is necessary for the plaintiff to prove in order to recover in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him." *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Such witness also as a matter of discretion properly may be allowed to be asked on his direct examination whether or not there was any unusual or unnecessary ringing of the gong or blowing of the whistle at any time before the accident as alleged in the plaintiff's declaration, and may be allowed to answer that there was none, the conclusions of fact involved in this answer and in the answers to the other questions described above not being a sufficient reason for their exclusion. *Ibid.*

Interrogatories, filed by the defendant for the taking of the deposition of its motorman in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," and relating to the witness's personal knowledge of the horse's manifestation of fright, which with their answers were held to have been properly admitted by the presiding judge in the exercise of his discretion. *Ibid.*

A street railway company is not liable for injuries sustained by a person who was attempting to get upon one of its cars as a passenger at the time the car was started when such a passenger was not expected and the conductor and the motorman of the car did not see the person attempting to get on the car and had no reason to expect to see such a person. *O'Loughlin* v. *Bay State Street Railway*, 65.

Although under ordinary circumstances it is negligence on the part of a conductor of an open street railway car for him to give the signal to start it when a passenger attempting to board the car has one foot on the running board and is not yet fairly on the car, yet these facts are not conclusive. *Ibid.*

In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the defendant's servants, the plaintiff cannot ask the conductor, who was in charge of the defendant's car, on his cross-examination, what experience the motorman who was operating the car at the time of the accident had had. *Sport, petitioner*, 453.

Elevated Railway.

On the evidence at the trial of an action against an elevated railway company for personal injuries received by a woman, as she was attempting in the night time to board a car in a train of the defendant at a station, by reason of falling into a space fourteen inches wide between the station platform

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and the door of the car, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury. *Harrington* v. *Boston Elevated Railway*, 299.

Railroad.

When on a railroad train the conduct and speech of one passenger toward another is such that violence is likely to result unless some action is taken to prevent it, and the railroad corporation has reasonable notice of the situation and has an opportunity to take measures to prevent the impending violence, it becomes the duty of the corporation to protect the threatened passenger and to see that no harm comes to him. *Isenberg* v. *New York, New Haven, & Hartford Railroad*, 182.

Where the conductor and a trainman of a railroad train were notified of a passenger's danger of being assaulted by a fellow passenger and did nothing effectual to protect him and the passenger was so assaulted and beaten, it was held that the assaulted passenger was entitled to go to the jury in an action against the railroad corporation operating the railroad for permitting the assault and battery. *Ibid.*

In Use of Highway.

In the absence of proper precautions to prevent accidents to travellers, a trench dug in a public sidewalk under a lawful permit from a city becomes a nuisance and the person who dug it is liable for injury caused by it to a traveller in the exercise of due care. *Dolan* v. *Charles J. Jacobs Co.* 256.

Evidence at the trial of an action by an elderly woman for personal injuries received from falling into such a hole, upon which it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant left the trench insufficiently guarded or lighted and thus caused the plaintiff's injuries, were for the jury. *Ibid.*

Facts which it is necessary for the plaintiff to prove in order to recover in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him." *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Of Steamship Company.

A passenger on an ocean going steamship, who was thrown overboard at a place where there was no guard chain or railing, was held under the circumstances not to have been negligent as matter of law, because he had the right to assume that during the voyage no place on the vessel where passengers were allowed to go would be left entirely without some guard or a rail at the edge of the deck to prevent a passenger from falling overboard. *Hanley* v. *Eastern Steamship Corp.* 125.

And it also was held that it could not be said as matter of law that such a passenger assumed the risk of such an injury. *Ibid.*

Upon the evidence it was held that it was a question for the jury whether such reasonable inspection as the owner ought to have exercised would have revealed the fact that the guard chain had become unfastened. *Ibid.*

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In Use of Automobile.

Where the judge presiding at the trial of an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, improperly allowed the plaintiff to show that the defendant in his application to the highway commission for a license to operate his automobile had failed to answer a question calling for the disclosure of any physical incapacity or infirmity, an exception by the plaintiff to a ruling permitting the defendant to explain his understanding of the meaning of the question in the application cannot be sustained. *O'Hare* v. *Gloag*, 24.

In the foregoing action, where the declaration alleged that the defendant was physically unfit to operate an automobile by reason of infirmities, the defendant properly was permitted to introduce evidence as to the manner in which he operated his automobile during the two years after the accident and that his physical condition had not changed materially from the time of the accident to the time of the trial, for the purpose of rebutting the inference that at the time of the accident he was unfit to control an automobile on account of his disabilities. *Ibid.*

But it was stated that such evidence was not admissible for the purpose of showing that the defendant was operating the automobile carefully at the time of the accident. *Ibid.*

At the trial of the foregoing action evidence introduced by the defendant, that the defendant after the accident drove his automobile carefully and that he was a slow and careful driver, clearly was incompetent. *Ibid.*

In guarding Hole in Highway.

In the absence of proper precautions to prevent accidents to travellers, a trench dug in a public sidewalk under a lawful permit from a city becomes a nuisance and the person who dug it is liable for injury caused by it to the traveller in the exercise of due care. *Dolan* v. *Charles J. Jacobs Co.* 256.

In Use of Elevator.

In an action by one employed as machinist in a factory of the defendant for personal injuries from a freight elevator being put in motion by a fellow workman when the plaintiff was sitting on the sill of a doorway of the elevator well on the ground floor and was engaged in directing repairs on the elevator well above him, it was held that on the evidence the question of the negligence of the defendant and of his employees was for the jury. *Pope* v. *Heywood Brothers & Wakefield Co.* 143.

Of One owning or controlling Real Estate.

On the evidence at the trial of an action against the owner of a building by a woman employee of a tenant on the fourth floor of the building for personal injuries caused by the plaintiff falling down a flight of steps in a stairway used in common by all the tenants in the building because a hand rail maintained there by the defendant came out of its bracket when it should have supported the plaintiff, it was held that findings were warranted that the plaintiff was in the exercise of due care and that the defendant was negligent. *White* v. *Beverly Building Association*, 15.

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If a person on the third floor of a six story building, who has landed from a freight elevator at that floor after pushing up a gate, returns a few moments later and sees that the gate is still up, and, relying on that fact and not noticing the absence of the elevator on account of the darkness of the place, thinks that the elevator has remained at the landing, and, stepping where he supposes it to be, falls down the elevator well, he is not negligent as matter of law. *Follins* v. *Dill*, 93.

Evidence which was held to warrant a finding that the owner of a six story building was liable for causing the death of a person, to whom he owed a duty greater than that owed to a mere licensee or trespasser, caused by such person's falling into a freight elevator well because a protecting gate failed to lower itself owing to a defective condition. *Ibid.*

Owner of a building was held not to be liable for the death of one, who was invited upon the premises by a tenant and was killed because he stepped into an open freight elevator well, both because the tenant's lease provided that the freight elevator should not be used except for freight and because an alleged custom only permitted persons to use that elevator when they were travelling with freight. *Ibid.*

One who is in a building by the invitation of a tenant has no greater right of recovery against the owner of the building for personal injuries suffered by him by reason of the condition of the premises than the tenant would have if he were injured. *Mackey* v. *Lonergan*, 296.

In an action for personal injuries suffered when the plaintiff, in entering a building in a city owned by the defendant at the invitation of one who was a tenant at will of the defendant under an agreement which gave entire control of the premises to the tenant and required him to make all ordinary repairs, fell down an unguarded flight of stairs, it was held that upon the evidence there could not have been any recovery by the tenant if he had been injured as the plaintiff was, and that therefore the plaintiff could not recover. *Ibid.*

The foregoing result was held not to be affected by the facts that the stairway was constructed as it was in violation of a permit issued to the defendant by the building department and of an ordinance of the city, that, if it had been constructed in accordance with the permit issued, it would not have been dangerous and that such construction had been done before the beginning of the tenancy of the person by whose invitation the plaintiff was on the premises, and that the premises had not been changed since. *Ibid.*

The evidence, in an action against the proprietor of a tenement house by the mother of one of the defendant's tenants for personal injuries sustained by falling down a stairway after she had left the apartment of her son in the evening, thinking that a gas jet was lighted in the hallway when it was not, was held to warrant a finding that the plaintiff was in the exercise of due care. *Gallagher* v. *Murphy*, 363.

In such action it also was held that the question of the defendant's negligence was for the jury. *Ibid.*

A landlord, who gratuitously promises a tenant that he will make certain repairs upon the demised premises and makes such repairs negligently, although he is liable for injuries to his tenant caused by such negligence, is not liable for an injury to an invitee of the tenant to whom the gratuitous promise was not made and to whom the landlord owed no duty in the matter. *Thomas* v. *Lane*, 447.

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In Maintenance of Defective Revolving Door.

In an action against the proprietor of a store for personal injuries sustained by the plaintiff from being thrown down by the rapid revolution of a revolving door through which the plaintiff was entering the defendant's store, it was held that there was evidence for the jury of negligence on the part of the defendant in not inspecting the friction strips and in failing to adjust them on their becoming worn down. *Norton* v. *Chandler & Co. Inc.* 99.

In such action, it was held also that a finding that the hastening of a man in going out was the immediate cause of the door spinning round and hitting the plaintiff in the back did not prevent a finding that the defendant's negligence was the cause of the plaintiff's injuries, if the jury found that the defendant reasonably ought to have anticipated that a customer might go out through the revolving door in a hurry and thus set it spinning. *Ibid.*

It is not necessarily negligent for a woman who is entering a store through a revolving door to fail to take hold of one of the brass railings with which each wing of the door is equipped. *Ibid.*

Dangerous Occupation.

Evidence in an action against a corporation called a laboratories company, by a child seventeen years of age employed in the defendant's rat poison filling department in a basement for illness and suffering alleged to have been caused by being poisoned, which was held to warrant the jury in finding that the plaintiff failed to understand the danger to which she was exposed, and that, although the conditions were known, the danger involved was not obvious and the plaintiff did not assume the risk of the injury she suffered. *Thompson* v. *United Laboratories Co.* 276.

In the case above stated, it also was held, that it could be found that the defendant was negligent in failing to warn the plaintiff that she might be poisoned by inhaling the dust from the volatile mixture she was told to put into cans, and that the defendant should have foreseen that injury in some form at some time probably would occur to some one engaged in what might be found to have been a business dangerous to the person employed. *Ibid.*

Hole in Sidewalk.

Evidence at the trial of an action by an elderly woman against a contractor for personal injuries received from falling into a trench dug in a sidewalk, upon which it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant left the trench insufficiently guarded or lighted and thus caused the plaintiff's injuries, were for the jury. *Dolan* v. *Charles J. Jacobs Co.* 256.

In digging in Sand.

It was held that under the circumstances no action could be maintained under St. 1907, c. 375, against a construction company to recover damages for the death of a son of a teamster carting sand for the defendant under a special contract, where it appeared that the death was caused by the falling of a tree on the edge of the sand pit, the danger from the overhanging tree being as apparent to the boy as it was to the company. *Lenzi* v. *Hanscom Construction Co.* 195.

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In piling of Merchandise.

In an action by a longshoreman against a steamship company by which he was employed for personal injuries resulting from the falling upon him of a box it was held, that there was no evidence that the fall of the box was caused by the negligence of the defendant or of its servants and that a verdict properly was ordered for the defendant. *Morris* v. *Eastern Steamship Corp.* 306.

Of Driver in Loss of Goods.

Circumstances, under which a wholesale dealer in tea and coffee hired from a general teamster a horse, wagon and driver, were held to warrant a finding that the driver was the servant of the general teamster and not of the dealer, and therefore that the dealer might maintain an action against the general teamster for the loss of tea caused by negligence of the driver. *W. S. Quinby Co.* v. *Estey*, 56.

Causing Death.

Where in an action by an executor under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's testatrix, the declaration contained no allegation that the testatrix was survived by any child or children or any next of kin and this subject was not mentioned at the trial, it is not open to the defendant, after he has obtained a verdict and the plaintiff has alleged exceptions, to contend at the argument of the plaintiff's exceptions that it does not appear that anybody is in existence for whose benefit the action could be brought. *O'Hare* v. *Gloag*, 24.

Where the judge presiding at the trial of an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, improperly allowed the plaintiff to show that the defendant in his application to the highway commission for a license to operate his automobile had failed to answer a question calling for the disclosure of any physical incapacity or infirmity, an exception by the plaintiff to a ruling permitting the defendant to explain his understanding of the meaning of the question in the application cannot be sustained. *Ibid.*

In the foregoing action, where the declaration alleged that the defendant was physically unfit to operate an automobile by reason of his infirmities and disabilities, the defendant properly was permitted to introduce evidence as to the manner in which he operated his automobile during the two years after the accident and that his physical condition had not changed materially from the time of the accident to the time of the trial, for the purpose of rebutting the inference that at the time of the accident he was unfit to control an automobile on account of his disabilities. *Ibid.*

But such evidence was not admissible for the purpose of showing that the defendant was operating the automobile carefully at the time of the accident. *Ibid.*

At the trial of the foregoing action evidence introduced by the defendant, that the defendant after the accident drove his automobile carefully and that he was a slow and careful driver, clearly was incompetent. *Ibid.*

Action against a street railway company for the death of an employee caused by the breaking of a guy pole could not be maintained on a count in the declaration alleging as the cause of the death a defect in the ways, works,

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appliances and mechanism of the defendant, where it did not appear that the pole was the defendant's. *MacLellan* v. *Boston Elevated Railway*, 20.

A passenger on an ocean going steamship, who was thrown overboard at a place where there was no guard chain or railing and died from his injuries, was held under the circumstances not to have been negligent as matter of law, because he had a right to assume that during the voyage no place on the vessel where passengers were allowed to go would be left entirely without some guard or a rail at the edge of the deck to prevent a passenger from falling overboard. *Hanley* v. *Eastern Steamship Corp.* 125.

And it also was held that it could not be said as matter of law that such a passenger assumed the risk of such an injury. *Ibid.*

When an ocean going vessel is carrying several hundred passengers and on a deck to which the passengers are admitted the open space between two life boats near the edge of the deck is guarded only by a chain which is unfastened easily, it is the duty of the owner of the vessel to make some sort of inspection to protect passengers against the danger likely to follow if the guard chain becomes unfastened. *Ibid.*

If under the circumstances the death of a passenger is caused by his falling overboard through the open space between the life boats, in an action against the steamship company it is a question for the jury whether such reasonable inspection as the defendant ought to have exercised would have revealed the fact that the guard chain had become unfastened. *Ibid.*

Where in such action the trial proceeded on the theory that the defendant's liability depended upon St. 1907, c. 375, whereas the defendant's liability was governed wholly by R. L. c. 70, § 6, but no specific exception to this error in procedure was taken at the trial, this court did not find it necessary to determine whether a new trial would have been ordered for this reason alone. *Ibid.*

And it also was found not to be necessary to decide whether the questions of the negligence of the defendant in its corporate capacity and of the gross negligence or unfitness of its servants or agents were raised by the defendant's requests for instructions in general terms, although these questions were not thought of by the judge or the counsel at the trial. *Ibid.*

It was held that under the circumstances no action could be maintained under St. 1907, c. 375, against a construction company to recover damages for the death of a son of a teamster carting sand for the defendant under a special contract, where it appeared that the death was caused by the falling of a tree on the edge of the sand pit, the danger from the overhanging tree being as apparent to the boy as it was to the company. *Lenzi* v. *Hanscom Construction Co.* 195.

Evidence at the trial of an action by an administrator under St. 1909, c. 514, §§ 127, 128, and at common law for negligently causing the suffering and death of the plaintiff's intestate when in the defendant's employ before the workmen's compensation act took effect, when the cylinder of a defective drum-setting machine flew out and struck the intestate on the head and chest, upon which it was held that the plaintiff was entitled to go to the jury. *Shea* v. *American Hide & Leather Co.* 282.

It was held that, at the trial of an action of tort by an administrator against a street railway company for causing the death of a workman in a wide street in a city, where it appeared that, as the plaintiff's intestate had stooped down in arranging some planks near street railway rails, his head was struck

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by a street car which passed at the rate of about twenty-two miles an hour and of the approach of which no sound of warning was given, there was evidence that the intestate was in the exercise of the due care required by St. 1907, c. 392, as a condition precedent to recovery, and that the motorman was negligent. *McCue* v. *Boston Elevated Railway*, 432.

At the trial of the action described above evidence as to a practice of the defendant of running its cars slowly and of striking the gong continuously while passing an area where repairs were being made was admissible, not only to show how the cars were run, but also to show that the intestate knew of the usual method and presumably governed his conduct accordingly. *Ibid.*

At the trial of an action against a street railway company by an administrator for the benefit of the next of kin of his intestate to recover the statutory penalty imposed for negligently causing the death of the intestate (before the enactment of St. 1914, c. 553) when the intestate by the invitation of the owner of a tip cart was sitting with such owner and another guest on a board placed as a seat across the tip cart, which was run into by a street car of the defendant at the corner of two streets, there was evidence for the jury that the intestate was actively looking out for his personal safety and thus was in the exercise of due care within the meaning of the statute. *Gaffney* v. *Bay State Street Railway*, 457.

Violation of Ordinance.

In an action by a workman against his employer for personal injuries caused by the falling of an elevator by reason of the breaking of a wire cable and the failure to work of a safety clutch, evidence is not admissible that the defendant failed to notify the superintendent of public buildings of the accident as required by an ordinance of the city in which the accident happened. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

Violation by the owner of a building of a permit of the building department and of an ordinance of a city, which resulted in the construction of a stairway in such a position as to cause injury to one later coming upon the premises at the invitation of a tenant, was held under the circumstances not to affect the question of liability of the owner for such injuries. *Mackey* v. *Lonergan*, 296.

Wilful Misconduct toward Trespasser.

In an action at common law for personal injuries sustained by reason of the wilful and reckless misconduct of the defendant in setting his dog on the plaintiff when he was a trespasser on the defendant's premises, it is not necessary for the plaintiff to allege or to prove that he was in the exercise of due care. *Zink* v. *Foss*, 73.

In such an action the plaintiff on obtaining a verdict is not entitled to recover double damages under R. L. c. 102, § 146, on the ground that his injuries were caused by the bite of the defendant's dog. *Ibid.*

Where, in such action, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no occasion for a new trial. *Ibid.*

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Proximate Cause.

In an action against the proprietor of a store for personal injuries sustained by the plaintiff from being struck in the back and thrown down by a revolving door through which she was entering the defendant's store, it was held that a finding that the hastening of a man in going out was the immediate cause of the door spinning round and hitting the plaintiff in the back did not prevent a finding that the defendant's negligence was the cause of the plaintiff's injuries, if the jury found that the defendant reasonably ought to have anticipated that a customer might go out through the revolving door in a hurry and thus set it spinning. *Norton* v. *Chandler & Co. Inc.* 99.

In an action by an employee against his employer for personal injuries, it was held that certain evidence as to acts of employees of an independent contractor which might have caused the plaintiff's injury still left for the jury the question, whether the defendant's negligence caused it. *Blokm* v. *Boston Elevated Railway*, 390.

NEITHER PARTY.

A mere entry, by agreement of the parties in an action of tort against one of two tortfeasors, of "Neither Party, no further suit to be brought for the same cause of action" is not an adjudication of the case nor a release and discharge of the defendant and does not operate to discharge the other joint tortfeasor from liability. *White* v. *Beverly Building Association*, 15.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

It is not necessary to the validity of a common law assignment for the benefit of creditors that notice of it should be given to the debtors of the assignor. *Cropper* v. *Gorham*, 119.

If the holder of a third mortgage of real estate in a notice of a sale in foreclosure of his mortgage states more than the facts recited in his mortgage as to the condition of the debts secured by the first and second mortgages and undertakes to make a statement as to the present amount due on either of those debts, he does so at his peril. *Russell* v. *Bon*, 370.

Such a notice which was held to make a foreclosure sale voidable by the owner of the equity of redemption. *Ibid.*

Where, at the trial of an action against an insurance company upon a policy of accident insurance, the defendant contended that the notice in writing of the plaintiff's injury required by the provisions of the policy was not given, it was held that, on the evidence as to certain negotiations of the insured with an agent of the company, the question, whether such notice was given, properly was left to the jury. *Constantino* v. *Massachusetts Accident Ins. Co.* 464.

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NUISANCE.

In the absence of proper precautions to prevent accidents to travellers, a trench dug in a public sidewalk under a lawful permit from a city becomes a nuisance and the person who dug it is liable for injury caused by it to the traveller in the exercise of due care. *Dolan* v. *Charles J. Jacobs Co.* 256.

Evidence at the trial of an action by an elderly woman for personal injuries received from falling into such a hole, upon which it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant left the trench insufficiently guarded or lighted and thus caused the plaintiff's injuries, were for the jury. *Ibid.*

PARENT AND CHILD.

The Legislature has power to authorize the appointment, as guardian of an illegitimate child with custody of the child's person, of some one other than the child's mother, although the mother is living. *Chambers's Case*, 178.

The Probate Court has jurisdiction to appoint as guardian of an illegitimate child a person other than the child's mother, although the mother is living. *Ibid.*

Such an appointment was upheld. *Ibid.*

Where a father made an application for an insurance policy on the life of his minor son and a policy was issued payable in case of the death of the son "unto the executors, administrators or assigns of the insured," and the father paid all premiums on the policy as they became due until the son became of age, it was held that the son was the insured. *Burke* v. *Prudential Ins. Co. of America*, 253.

It also was held that neither the father nor the mother was an owner of or a beneficiary under the policy, and, unless specially authorized by the insured, that neither of them had authority to surrender the policy to the insurer or to receive under its provisions in its stead a paid up policy. *Ibid.*

And that therefore as between the insured and the insurer the policy was unchanged in legal effect by unauthorized acts of such a nature. *Ibid.*

PARKS AND PARKWAYS.

A dedication of land to the use of the public for a park or pleasure ground need not be in writing and may be shown by oral statements of the landowner or of those authorized to act in his behalf, or by acts of the landowner from which his intention can be inferred. *Attorney General* v. *Onset Bay Grove Association*, 342.

On findings contained in a master's report it was held, that there was evidence that a corporation, whose purposes were to provide a place for holding camp, grove and other meetings of a social and religious character and to create and establish a popular summer resort, by its acts and declarations had dedicated the use of certain lands to the public, and ample evidence of acceptance by the public, and that the corporation should be enjoined from selling, leasing or obstructing its parks, groves and shore fronts which were subject to the public easement thus acquired. *Ibid.*

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PARTNERSHIP.

One who has suffered injury or damage by reason of a tort of a partnership may elect to bring an action of tort against all the partners jointly or to bring a separate action against each partner. *Contakis* v. *Flavio*, 259.

A judgment in an action of tort against all the members of a partnership is an entirety and is indivisible. *Ibid.*

If, upon the petition of one of the defendants in an action of tort against all the members of a partnership jointly, a judgment obtained in that action is vacated, it is vacated against all the defendants and all remedies for its collection against the several defendants are discharged. *Ibid.*

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Ibid.*

PASSENGER.

Actions for personal injuries suffered by passengers, see appropriate subtitles under CARRIER and NEGLIGENCE.

PERMIT.

One who under a lawful permit from a city digs a trench in a public sidewalk assumes the duty of taking proper precautions to prevent accidents to travellers. *Dolan* v. *Charles J. Jacobs Co.* 256.

In the absence of adequate precautions such trench becomes a nuisance and the person who dug it is liable for injury caused by it to a traveller in the exercise of due care. *Ibid.*

A person entering a building in a city on the invitation of a tenant therein and injured by falling down an unguarded flight of stairs was held under the circumstance to be unable to recover against the owner of the building although it appeared that the stairway was constructed as it was by the defendant in violation of a permit issued to the defendant by the building department and of an ordinance of the city, that, if it had been constructed in accordance with the permit issued, it would not have been dangerous and that such construction had been done before the beginning of the tenancy of the person by whose invitation the plaintiff was on the premises and the premises had not been changed since. *Mackey* v. *Lonergan*, 296.

PERSONAL PROPERTY

See REAL AND PERSONAL PROPERTY.

PHYSICIANS AND SURGEONS.

R. L. c. 76, § 8, providing penalties for practicing medicine within this Commonwealth without a license is constitutional. *Commonwealth* v. *Zimmerman*, 184.

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The provisions of R. L. c. 76, § 9, excluding persons practicing certain methods of healing from the provisions of § 8 of the same chapter prescribing penalties for practicing medicine without being authorized to do so and registered, does not render the statute unreasonable toward a person practicing chiropractic who is convicted under § 8 of practicing medicine without a license, nor does it deny to such person the equal protection of the laws. *Commonwealth* v. *Zimmerman*, 184.

One who calls himself a chiropractor and, without a license to practice medicine, is engaged in the practice of chiropractic, which "is the specific science that removes pressure upon the nerves by the adjustment of spinal vertebrae" by hand only without the use of instruments, may be found guilty of practicing medicine without a license within the meaning of R. L. c. 76, § 8. *Ibid.*

PLACE OF BUSINESS.

On certain facts it was held that a certain person who made an assignment for the benefit of his creditors had a place of business after the assignment within the meaning of St. 1909, c. 490, Part I, § 23, cl. 8, which determined where the property in the hands of the assignee should be assessed for taxation, and that such place of business was Boston. *Collector of Taxes of Boston* v. *New England Trust Co.* 384.

PLEADING, CIVIL.

Declaration.

Declaration in an action for the enforcement of an agreement, which was collateral to a promissory note given by the plaintiff to the defendant in payment for certain bonds of a corporation controlled by the defendant and related to the principal and interest of the note being paid from proceeds of the bonds, was held to set forth a cause of action although it was not well drawn. *Keith* v. *Radway*, 515.

An allegation, in the declaration in an action of contract upon a policy of fire insurance in the Massachusetts standard form seeking to recover damages greater than the amount awarded by arbitrators to whom the question of the amount of the loss was referred under the terms of the policy, that no notice of hearings before the arbitrators was given to the insured by the arbitrators, is not sufficient to warrant the overruling of a demurrer to the declaration on the ground that such lack of notice made an award by the arbitrators invalid. *Second Society of Universalists* v. *Royal Ins. Co. Ltd.* 518.

An allegation in the declaration in such action that the award made by the arbitrators was "grossly inadequate" was held not sustained by the allegations of the declaration. *Ibid.*

Equitable Defence.

It was held that an alleged mistake in including in a deed of real estate a strip of land not intended to be conveyed could not be corrected in defence to a writ of entry brought by the grantee of the added strip of land to assert his title, unless under R. L. c. 173, § 28, the grantee of the diminished

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lot could be allowed to set up a mutual mistake of fact as an equitable defence, a question which was not raised in this case. *Pollard* v. *Ketterer*, 317.

Variance.

It was held that there was no variance in an action of tort for personal injuries, suffered by the plaintiff falling down a flight of stairs in a common stairway in a building controlled by the defendant, between an allegation in the declaration that the cause of the plaintiff's injuries was negligence of the defendant "in allowing and maintaining said halls, landings, and stairways to be in such unsafe and dangerous condition, and so dark and insufficiently lighted," and evidence tending to show that the fall was due to the defective condition of the hand railing of the stairway. *White* v. *Beverly Building Association*, 15.

PLEDGE.

An instrument of trust which provided that, because of the pendency in the United States Supreme Court of two suits in which no supersedeas bonds had been given, "and for other reasons," the grantor sold and conveyed to the trustee with full power to hold it, to sell it when in his discretion it was good business judgment to do so to fulfil certain business obligations of the creditor, and, at the termination of the pending litigation, to convert the property into cash and to distribute it substantially in accordance with the provisions of the national bankruptcy act to such creditors as assented to the provisions of the trust, paying the balance, if any, to the grantor, was held to be an assignment for the benefit of creditors and not a mortgage or pledge. *Collector of Taxes of Boston* v. *New England Trust Co.* 384.

The ordinary relation of pledgor and pledgee, although sometimes spoken of as in the nature of a trust, is not a fiduciary one as affecting the period of limitation of actions at law or the time within which a suit in equity must be brought. *Wehrle* v. *Mercantile National Bank of Salem*, 585.

Where the right of a pledgor to demand and receive certain shares of stock pledged to secure the payment of certain notes given by the pledgor for the accommodation of the pledgor's son was asserted for the first time in a suit in equity brought twenty-eight years after the notes had been paid, and there was nothing to indicate any deception or concealment on the part of the pledgee, it was held, that the suit was barred by laches. *Ibid.*

In the suit above described the facts, that after the notes had been paid the assignee in insolvency of the estate of the pledgor had died and that no successor was appointed until the plaintiff was appointed such successor twenty-two years after the death of the original assignee, were held to have had no effect to suspend the operation of the lapse of time. *Ibid.*

POLICE.

A suit in equity may be maintained to recover property stolen from the plaintiff which is in the custody of the police department of a city after having been taken from the thief when he was arrested for another crime and where the officers having custody of the property have refused to expose it so that it can be taken in replevin. *Homrich* v. *Robinson*, 308.

Where in such a case the court has jurisdiction to compel the restoration of

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specific property stolen from the plaintiff this jurisdiction will be retained to cover also money found in the possession of the thief when he was arrested which he had derived wholly from the sale of other property that he stole from the plaintiff at the same time. *Homrich* v. *Robinson*, 308.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Where a foreman suspended for cause filed under St. 1911, c. 624, a petition for a review in the police court having jurisdiction and after a hearing the court affirmed the order of the commissioner who suspended him, the foreman, having elected to accept the relief afforded by that statute, is bound by the decision. *Gardner* v. *Lowell*, 150.

Therefore, in an action afterwards brought by him against the city, he cannot be allowed to show that he was suspended not in good faith but from political and personal motives, the good faith in the alleged ground of suspension being a matter of fact determined by the decision of the police court. *Ibid.*

In computing the "six days after the entry of the judgment" within which, by the provision of R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, a person aggrieved by a judgment of a municipal court in a civil action may appeal to the Superior Court, Sunday is excluded. *Stevenson* v. *Donnelly*, 161.

In the same statute, the word "days" means entire days, and an appeal perfected at any time during the sixth day, exclusive of Sunday, although not within the sixth secular period of twenty-four hours, is effectual. *Ibid.*

POOR DEBTOR.

Where a debtor after his arrest upon an execution and a certificate has entered into a recognizance in a police court under R. L. c. 168, § 30, to appear before the court and abide its final order, if the judge of another police court, before whom the debtor appears for examination on his application to that court to take the oath for the relief of poor debtors, orders his discharge, the debtor has performed the obligation of his recognizance, and, if the order of the judge was erroneous in law, this constitutes no breach of the recognizance on the part of the debtor. *Haskell* v. *Cunningham*, 49.

Where, after the debtor entered into such a recognizance he made application to another police court to take the oath for the relief of poor debtors, this properly is regarded as "the commencement" of a proceeding and it became the duty of the execution creditor under R. L. c. 168, § 74, to pay an entry fee of $3, and, if he refused to do this, it was right for the judge of the court to refuse to allow the examination to proceed and to order the debtor discharged. *Ibid.*

R. L. c. 168, § 66, requires that in an action for the breach of a poor debtor's recognizance, if a breach is proved, "judgment shall be entered for the amount of the penalty," and accordingly in such an action the trial judge must refuse a request of the defendant to rule that judgment should be entered for the plaintiff for nominal damages only. *American Stable Co.* v. *Clarke*, 271.

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POWER.

Where a clause in a will by which the intestate exercised a certain power of appointment given to him by the will of his mother, was followed by a clause expressing the testator's wish that "all the legacies hereinbefore given to be paid in full to the various legatees without deduction for legacy taxes and succession dues," it was held under the circumstances that the word "legacies" was not intended to include appointments, and that the succession taxes payable to the Commonwealth on the transfers made under the appointment were payable out of the fund appointed and not out of the residue of the estate of the testator. *Loring* v. *Gardner*, 571.

Under St. 1909, c. 490, Part IV, § 1, and St. 1909, c. 527, § 8, the exercise by a testator, whose domicil was in this Commonwealth and whose will was proved here, of a power of testamentary appointment given to him by a will of a testator, whose domicil was in another State, transferring by such appointment the title to personal property held by a trustee in such other State, is not subject to a succession tax. *Walker* v. *Treasurer & Receiver General*, 600.

The so-called succession tax imposed by our statutes on the passing of property by the exercise of a power of appointment is an excise upon the commodity of the privilege of passing title under the sanction and protection of the laws of this Commonwealth, and the statutes imposing such excise have no application where the property transferred by the exercise of the power is not physically within the jurisdiction of this Commonwealth and the succession to it does not depend on any privilege conferred by our laws. *Ibid.*

PRACTICE, CIVIL.

Venue.

Under St. 1904, c. 320, an action by an administrator for injuries received by the plaintiff's intestate by reason of the defendant's negligence cannot be maintained in the county in which the plaintiff is employed as the manager of a department store and in which the plaintiff's intestate was employed as the assistant manager of the same store, if the plaintiff lives and his intestate lived in another county and the intestate's injuries were received in still a third county. *Hanley* v. *Eastern Steamship Corp.* 125.

Premature Action.

Where, at the trial of an action against a manufacturer for the alleged breach of a contract to employ the plaintiff for a year, it appeared that the only question was whether the action was brought before the contract was broken, the defendant was held not to be entitled to a ruling that there was no breach of the contract at the time the action was brought. *Marshall* v. *Columbia Manuf. Co.* 176.

Deposition.

Interrogatories, filed by the defendant for the taking of the deposition of its motorman in an action against a street railway company for personal injuries caused by the plaintiff's horse shying and throwing the plaintiff out

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of his wagon when the horse was "frightened by the loud and continuous ringing of a gong on a car operated by an employee of the defendant coming up behind him," relating to the witness's personal knowledge of the horse's manifestation of fright, which with their answers were held to have been properly admitted by the presiding judge in the exercise of his discretion. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Such witness also as a matter of discretion properly may be allowed to be asked on his direct examination whether or not there was any unusual or unnecessary ringing of the gong or blowing of the whistle at any time before the accident as alleged in the plaintiff's declaration, and may be allowed to answer that there was none, the conclusions of fact involved in this answer and in answers to the other questions described above not being a sufficient reason for their exclusion. *Ibid.*

Auditor's Report.

Where in an action of contract the plaintiff offers in evidence an auditor's report in his favor, and the defendant objects to a portion of the report, which is in fact objectionable, he has no right to except to the admission in evidence of this part of the report but should move to have the objectionable portion stricken out, and an exception by the defendant to the introduction in evidence of the objectionable portion which has not been stricken out must be overruled. *Fillmore* v. *Johnson*, 406.

Where in an action of contract the plaintiff has introduced in evidence an auditor's report in his favor, which contains certain erroneous portions that have remained as a part of the report because the defendant has failed to ask to have them stricken out, the defendant is entitled to have the jury instructed that in so far as the auditor's report differs from the rulings of the judge it must be disregarded, and an exception to a refusal to give such an instruction will be sustained. *Ibid.*

Interlocutory Order.

Whether an interlocutory order of the Superior Court, made upon a petition under St. 1909, c. 514, § 141, of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, is a "judgment founded upon matter of law apparent on the record in any proceeding," from which an appeal to this court can be taken under St. 1906, c. 342, § 2, it here was not necessary to decide. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

It also was unnecessary to decide whether, in a case where no exceptions were taken, an appeal from such an interlocutory order would stay the entry of judgment. *Ibid.*

Trial by Judge without Jury.

The failure of a judge before whom a case is tried without a jury to pass upon a request for a ruling is equivalent to a refusal to make a ruling. *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548.

A judge before whom a case is tried without a jury has a right to disregard the evidence of one of the parties and to believe the testimony to the contrary on the other side, and his doing this is not an error of law. *Lancaster* v. *Stanetsky*, 312.

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In a certain action to recover damages under a special contract by which the plaintiff agreed to furnish certain goods, retaining the title to them, to be sold by the defendant in his store as the plaintiff's agent, where the plaintiff contended that a balance was due to him, it was held, that, the issues being wholly of fact, a finding for the plaintiff by the judge, who heard the case without a jury, was conclusive. *C. H. Eden Co.* v. *Henry Krey Co.* 62.

Rules of Court.

Rule 29 of the Superior Court, *Sherman* v. *Collingwood*, 8.
Rule 45 of the Superior Court, *Chandler* v. *Prince*, 495.

Agreement as to Facts.

Where an action at law is heard by a judge without a jury, and the parties instead of putting in their evidence agree in writing upon certain facts on which the case is to be decided under the pleadings, this is not a submission of the case upon an agreed statement of facts, and, if there is an appeal from a judgment based on the finding of the judge in such a case, the question for this court is whether as matter of law the finding was warranted. *Harmon* v. *Sweet*, 587.

Conduct of Trial.

Stipulation of counsel.

Where, in an action against a street railway company for personal injuries, the counsel for the defendant assents to the introduction in evidence of a letter from its attorney containing an offer of settlement on the stipulation by the plaintiff's attorney that the letter might be explained, an exception afterwards cannot be taken by the plaintiff to evidence introduced by the defendant to explain that an offer was made upon the basis that the defendant was not responsible for the accident. *Sport, petitioner*, 453.

Evidence admitted *de bene*.

Where at a trial evidence which was objected to was admitted *de bene* by the presiding judge, and an exception was taken to its admission, this exception to the provisional admission of the evidence cannot be sustained unless the excepting party afterwards asked to have the evidence stricken out. *Haskell* v. *Cunningham*, 49.

Direct examination of witnesses.

In this Commonwealth the admission of leading questions in the direct examination of a witness is within the discretionary power of the judge presiding at the trial and, at any rate when confined to reasonable limits, is not subject to revision by exception or otherwise. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Cross-examination of witnesses.

The limits of cross-examination are subject to the discretionary regulation of the presiding judge. *O'Hare* v. *Gloag*, 24.

Limitation of scope of evidence.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him

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were procured by fraud or undue influence, a limitation by the presiding judge in the exercise of his discretion of the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged codicil, was held to be neither unfair nor arbitrary. *Johnson* v. *Foster*, 248.

Requests, rulings and instructions.

Where a question as to the application of a custom to the performance of a contract had been left to a jury under correct instructions, it was held that an exception of the defendant to the refusal of the judge to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, was overruled. *Tapley* v. *Thayer-Osborne Shoe Co.* 166.

Where, at the trial of an action against a manufacturer for the alleged breach of a contract to employ the plaintiff for a year, it appeared that the only question was whether the action was brought before the contract was broken, the defendant was held not to be entitled to a ruling that there was no breach of the contract at the time the action was brought. *Marshall* v. *Columbia Manuf. Co.* 176.

Where in an action of contract the plaintiff has introduced in evidence an auditor's report in his favor, which contains certain erroneous portions that have remained as a part of the report because the defendant has failed to ask to have them stricken out, the defendant is entitled to have the jury instructed that in so far as the auditor's report differs from the rulings of the judge it must be disregarded, and an exception to a refusal to give such an instruction will be sustained. *Fillmore* v. *Johnson*, 406.

Where at the close of the charge of the presiding judge at a trial, one of the counsel asked orally for a certain instruction, to which the judge replied, "I gave everything that you requested that I thought ought to be given," this was held to have been a refusal by the judge to give, under Rule 45 of the Superior Court, special leave to present a further request after the conclusion of the charge. *Chandler* v. *Prince*, 495.

It was held that certain remarks of a judge at a trial after he had given certain instructions asked for did not have the effect of taking back the instructions, and that the instructions given by the judge in accordance with the requests were to be treated as given in the proper manner. *Ibid.*

The failure of a judge before whom a case is tried without a jury to pass upon a request for a ruling is equivalent to a refusal to make the ruling. *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548.

Argument of counsel.

At the argument of exceptions alleged by the defendant in an action of tort after a verdict for the plaintiff, where the question is whether there was any evidence on which the jury could find for the plaintiff on the issues of fact on which the rights of the parties depend, it is out of place for the counsel for the defendant in his argument to compare the number of witnesses who testified in favor of the defendant and the character of the testimony given by them with the number who testified for the plaintiff and the character of their testimony. *Gaffney* v. *Bay State Street Railway*, 457.

Special questions to jury.

See *post*.

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Judge's charge.

Objection to the charge to the jury at the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and that of a codicil by him were procured by fraud or undue influence, that the judge saw and called attention to more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting on the testimony of the witnesses for the executor, was held not to be a ground for exception under the circumstances. *Johnson* v. *Foster*, 248.

Whether under any circumstances a biased or prejudicial statement in a charge to a jury may be an error of law so that a verdict returned in accordance with it may be regarded as "against the law" in a comprehensive sense, was not decided. *Parker* v. *Lewis J. Bird Co.* 422.

It was held that certain remarks of a judge at a trial after he had given certain instructions asked for did not have the effect of taking back the instructions and that the instructions given by the judge in accordance with the requests were to be treated as given in the proper manner. *Chandler* v. *Prince*, 495.

Variance.

It was held that there was no variance in an action of tort for personal injuries, suffered by the plaintiff falling down a flight of stairs in a common stairway in a building controlled by the defendant, between an allegation in the declaration that the cause of the plaintiff's injuries was negligence of the defendant "in allowing and maintaining said halls, landings, and stairways to be in such unsafe and dangerous condition, and so dark and insufficiently lighted," evidence tending to show that the fall was due to the defective condition of the hand railing of the stairway. *White* v. *Beverly Building Association*, 15.

Ordering Verdict.

Where, at the trial of an action upon a guaranty in writing, the defendant admits the execution of the agreement of guaranty and all the defences offered by the defendant are as a matter of law untenable and there is no question as to the amount due under the contract, it is proper to order a verdict for the plaintiff. *International Textbook Co.* v. *Martin*, 1.

In an action on a promissory note by an indorsee against the maker, where the defendant has introduced some evidence to show that the note was obtained from him by fraud, the burden is on the plaintiff to prove that he is a holder in due course and it is improper to order a verdict for the plaintiff although the plaintiff and the payee, called as adverse witnesses by the defendant, give some evidence tending to show that the plaintiff is a holder in due course. *Phillips* v. *Eldridge*, 103.

Special Questions to Jury.

Because, in an action against a steamship company for causing the death of one who fell overboard because of a lack of a guard chain or rail, exceptions of the defendant were sustained on other grounds, it was unnecessary to decide whether a special question to the jury "Was the defendant negligent in failing properly to guard the place where the accident happened?" was

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objectionable, but a better form for the question was suggested. *Hanley* v. *Eastern Steamship Corp.* 125.

In an action under R. L. c. 99, § 4, by the executor of the will of a woman, for the value of securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts, two special questions were put to the jury and it was held that an affirmative answer to the second question after a negative answer to the first under all the circumstances did not show that the jury misunderstood the instructions as to the first question, so that exceptions to the instructions in regard to the first question were overruled and a general verdict returned for the defendant was allowed to stand. *Chandler* v. *Prince*, 495.

Verdict.

Where, in an action of tort at common law for personal injuries caused by the wilful misconduct of the defendant in setting his dog on the plaintiff who had fallen from a fence when he was a trespasser on the defendant's premises, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no occasion for a new trial. *Zink* v. *Foss*, 73.

In an action of contract, where the declaration contains two counts and the defendant admits that the plaintiff is entitled to recover on the second count but contests his liability upon the first count and the jury return a general verdict for the plaintiff on both counts for a certain amount of money, from which it is impossible to know what part of the damages was awarded on the second count and how much upon the first count, if the defendant upon exceptions shows that the presiding judge erred in refusing to give an instruction to the jury to which the defendant was entitled, so that his exceptions must be sustained, the verdict cannot stand for any amount. *Fillmore* v. *Johnson*, 406.

In an action under R. L. c. 99, § 4, by the executor of the will of a woman, for the value of securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts, two special questions were put to the jury and it was held that an affirmative answer to the second question after a negative answer to the first under all the circumstances did not show that the jury misunderstood the instructions as to the first question, so that exceptions to the instructions in regard to the first question were overruled and a general verdict returned for the defendant was allowed to stand. *Chandler* v. *Prince*, 495.

New Trial.

The filing, in support of a motion for a new trial on the ground of newly discovered evidence, of affidavits stating under oath merely the facts which will be shown by the newly discovered evidence satisfies the requirements of Rule 29 of the Superior Court. *Sherman* v. *Collingwood*, 8.

It is not necessary for a judge in granting a motion for a new trial on the ground of newly discovered evidence to file a memorandum stating the facts upon

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which he bases his action. The granting of the motion is in itself a finding of the facts upon which it is based. *Sherman* v. *Collingwood*, 8.

A judge, hearing a motion for a new trial of an action for the conversion of a pile of junk based on the ground of newly discovered evidence tending to show that certain testimony of the plaintiff as to quantities of copper, lead and brass in the pile were false, found that the defendant had not been guilty of negligence in not ascertaining before the trial the facts set out in the affidavit, and it was held that the finding was warranted under the circumstances. *Ibid.*

In such a case evidence of the falsity of the testimony of the plaintiff as to the presence of copper, lead and brass does not tend merely to show that the verdict was excessive, in which case by R. L. c. 173, § 112, it should not be set aside until the plaintiff had been given an opportunity to remit what was adjudged excessive, but tends to prove the falsity of the plaintiff's entire case. *Ibid.*

It cannot be said that the judge in such a case was in error in refusing to consider a certain affidavit on the ground that there was no evidence to support one fact upon which it was based, where all the evidence at the trial is not reported, because the judge had all the evidence at the trial before him and it could not be assumed that there was no such supporting evidence at the trial. *Ibid.*

Judge also was held under the circumstances to have been warranted in refusing to rule that certain newly discovered evidence tended only to discredit the plaintiff's testimony, because it tended to discredit and disprove the plaintiff's entire circumstantial story of the formation of her business and her ownership of the junk. *Ibid.*

A finding of the judge upon a motion by a defendant for a new trial, based on newly discovered evidence that the plaintiff had not had a bank account in a bank in Boston, that the defendant might have exercised due diligence and yet not have discovered the facts alleged in his affidavit during the intermission in the trial, was warranted where it appeared that the trial was in Plymouth, that the plaintiff on a Friday had testified that she had had such a bank account, and that the court thereafter had adjourned until Monday. *Ibid.*

In this court a plaintiff, who has excepted to the refusal of a trial judge to grant certain rulings requested by him at the hearing of a motion for a new trial based on newly discovered evidence, must sustain the burden of showing that he was harmed by the refusal of his request. *Ibid.*

There can be no appeal to this court before a final judgment from an order of a judge granting a motion for a new trial. *Ibid.*

Where an error at the trial of an action of tort for personal injuries, in which the plaintiff obtained a verdict, consisted only of the admission of certain incompetent evidence introduced by the plaintiff upon the question of damages, this court in sustaining exceptions alleged by the defendant ordered that the new trial should be confined to that issue. *Mahoney* v. *Boston Elevated Railway*, 116.

Motions for new trials of issues framed upon appeals from decrees of the Probate Court are governed by the same rules as are motions for new trials in actions at common law. *Lambert* v. *Cheney*, 378.

A motion for a new trial of issues, which were framed by the Supreme Judicial Court on an appeal from a decree of a Probate Court allowing a will and

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were sent to the Superior Court for trial, can be made only in the Superior Court, where the issues were tried. *Lambert* v. *Cheney*, 378.

A judge of the Superior Court has no power to order a new trial for a reason not expressly stated in a motion for a new trial or by fair implication included within the reasons therein stated. *Parker* v. *Lewis J. Bird Co.* 422.

Under R. L. c. 173, § 112, providing among other things that a verdict may be set aside only upon a motion in writing "heard after notice to the adverse party," a reasonable opportunity for argument must be afforded to the party who has obtained a verdict before a motion for a new trial is granted. *Ibid.*

Accordingly, if at a hearing of a motion of a plaintiff for a new trial after a verdict for the defendant the judge, after argument by the plaintiff's counsel as to a portion of the charge which the counsel argues was prejudicial to his client, states that he will look over the charge, and, upon the counsel for the defendant offering to argue against the motion, adds that he will "hear counsel further at a later time," and then, without giving the defendant's counsel an opportunity to be heard, grants the motion, an exception of the defendant thereto must be sustained. *Ibid.*

Whether under any circumstances a biased or prejudiced statement in a charge to a jury may be an error of law so that a verdict returned in accordance with it may be regarded as "against the law" in a comprehensive sense, was not decided. *Ibid.*

Memorandum.

It is not necessary for a judge in granting a motion for a new trial on the ground of newly discovered evidence to file a memorandum stating the facts upon which he bases his action. The granting of the motion is in itself a finding of the facts upon which it is based. *Sherman* v. *Collingwood*, 8.

Entry of "Neither Party."

A mere entry, by agreement of the parties in an action of tort against one of two tortfeasors, of "Neither Party, no further suit to be brought for the same cause of action" is not an adjudication of the case nor a release and discharge of the defendant and does not operate to discharge the other joint tortfeasor from liability. *White* v. *Beverly Building Association*, 15.

Ordering of Judgment under St. 1913, c. 716, § 2.

Where, in an action of tort at common law for personal injuries caused by the wilful misconduct of the defendant in setting his dog on the plaintiff who had fallen from a fence when he was a trespasser on the defendant's premises, the plaintiff had obtained a verdict to which he was entitled and the presiding judge erroneously had doubled the amount of the damages awarded by the jury, wrongly supposing that R. L. c. 102, § 146, applied when it did not, this court under St. 1913, c. 716, § 2, ordered judgment for the plaintiff in the amount of the original verdict, there being no occasion for a new trial. *Zink* v. *Foss*, 73.

Entry of Judgment.

It was unnecessary to decide whether, in a case where no exceptions were taken, an appeal from an interlocutory order of the Superior Court, made upon a petition under St. 1909, c. 514, § 141, of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney

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to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, would stay the entry of judgment. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

Vacation of Judgment.

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Contakis* v. *Flavio*, 259.

Exceptions.

Extension of time for filing of bill.

Under R. L. c. 173, § 106, a motion for an extension of the time for filing exceptions may be allowed by a trial judge without any notice to the adverse party if the motion was filed before the time limit expired, although it is the better practice to notify the opposing counsel in cases where this reasonably may be done. *Kennedy* v. *Hub Manuf. Co.* 136.

Such motion may be granted after the adjournment of the sitting of the court at which the case is tried. *Ibid.*

Whether exception was saved.

An objection to the consideration of evidence, which previously in the trial had been admitted without objection, made when the judge referred to the evidence in his charge by saying to the jury, "You may exclude that from your minds unless it appears that it was admitted without objection," here was not considered as an exception, because an objection is not an exception. *Chandler* v. *Prince*, 495.

Amendment of bill.

An exception, which originally had been included in a bill of exceptions, here was not considered, because it had been stricken out from the bill of exceptions by an amendment allowed by the judge which was "agreed to by both parties." *O'Hare* v. *Gloag*, 24.

When an exception lies.

It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus. The usual method of bringing the question of the correctness of such rulings before this court is by a report or a reservation by the single justice, or an adjournment of the case into this court for determination. *Chambers's Case*, 178.

Objection to the charge to the jury at the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and that of a codicil by him were procured by fraud or undue influence, that the judge saw and called attention to more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting on the testimony of the witnesses for the executor, was held not to be a ground for exception under the circumstances. *Johnson* v. *Foster*, 248.

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In this Commonwealth the admission of leading questions in the direct examination of a witness is within the discretionary power of the judge presiding at the trial and, at any rate when confined to reasonable limits, is not subject to revision by exception or otherwise. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Where a judge presiding at a trial found that certain declarations of a deceased person, offered in evidence under R. L. c. 175, § 66, were made of the declarant's own knowledge, and admitted the declarations in evidence, and where the evidence did not warrant such a finding, the ruling admitting the evidence is subject to an exception, and an exception thereto must be sustained. *Ames* v. *New York, New Haven, & Hartford Railroad*, 304.

Exception to the admission of such evidence which, it was held, should be sustained. *Ibid.*

A judge before whom a case is tried without a jury has a right to disregard the evidence of one of the parties and to believe the testimony to the contrary on the other side, and his doing this is not an error of law and is not subject to an exception. *Lancaster* v. *Stanetsky*, 312.

If, at the trial by a jury in the Superior Court of issues framed upon an appeal from a decree of the Probate Court allowing a will, there is evidence warranting findings in favor of the proponent of the will and the jury so find, the appellant cannot bring to this court the question whether such findings were against the weight of the evidence by an exception to a refusal of the presiding judge to order answers for him upon the issues. *Dunster* v. *Goward*, 339.

Where, in an action against a street railway company for personal injuries, the counsel for the defendant assents to the introduction in evidence of a letter from its attorney containing an offer of settlement on the stipulation by the plaintiff's attorney that the letter might be explained, an exception afterwards cannot be taken by the plaintiff to evidence introduced by the defendant to explain that an offer was made upon the basis that the defendant was not responsible for the accident. *Sport, petitioner*, 453.

Where in an action of contract the plaintiff offers in evidence an auditor's report in his favor, and the defendant objects to a portion of the report, which is in fact objectionable, he has no right to except to the admission in evidence of this part of the report but should move to have the objectionable portion stricken out, and accordingly an exception by the defendant to the introduction in evidence of the objectionable portion which has not been stricken out must be overruled. *Fillmore* v. *Johnson*, 406.

In such case the defendant is entitled to have the jury instructed that in so far as the auditor's report differs from the rulings of the judge it must be disregarded, and an exception to a refusal to give such an instruction will be sustained. *Ibid.*

Where a question as to the application of a custom to the performance of a contract had been left to a jury under correct instructions, it was held that an exception to a refusal to rule that, if certain facts should be found by the jury, the custom upon which the plaintiff relied was not applicable, properly was overruled. *Tapley* v. *Thayer-Osborne Shoe Co.* 166.

Where at a trial evidence which was objected to was admitted *de bene* by the presiding judge, and an exception was taken to its admission, this exception to the provisional admission of the evidence cannot be sustained unless the

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excepting party afterwards asked to have the evidence stricken out. *Haskell* v. *Cunningham*, 49.

What questions are open.

Where in an action by an executor under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, the declaration contained no allegation that the testatrix was survived by any child or children or any next of kin and this subject was not mentioned at the trial, it is not open to the defendant, after he has obtained a verdict and the plaintiff has alleged exceptions, to contend at the argument of the plaintiff's exceptions that it does not appear that anybody is in existence for whose benefit the action could be brought. *O'Hare* v. *Gloag*, 24.

Where a defendant's bill of exceptions contained a reference and description of a view by the jury, and a statement that the "reference to the view is made a part of the record against the objection of the defendant who excepts thereto," it was held that the defendant, having presented the bill of exceptions, could not be heard to complain of what it contained, and also that there was nothing to indicate that the defendant was harmed in any way by the reference to the view. *Pope* v. *Heywood Brothers & Wakefield Co.* 143.

At the argument of exceptions alleged by the defendant in an action of tort after a verdict for the plaintiff, where the question is whether there was any evidence on which the jury could find for the plaintiff on the issues of fact on which the rights of the parties depend, it is out of place for the counsel for the defendant in his argument to compare the number of witnesses who testified in favor of the defendant and the character of the testimony given by them with the number who testified for the plaintiff and the character of their testimony. *Gaffney* v. *Bay State Street Railway*, 457.

Whether excepting party was harmed.

In this court a plaintiff, who has excepted to the refusal of a trial judge to grant certain rulings requested by him at the hearing of a motion for a new trial based on newly discovered evidence, must sustain the burden of showing that he was harmed by the refusal of his request. *Sherman* v. *Collingwood*, 8.

It cannot be said that the judge in such a case was in error in refusing to consider a certain affidavit on the ground that there was no evidence to support one fact upon which it was based, where all the evidence at the trial is not reported, because the judge had all the evidence at the trial before him and it could not be assumed that there was no such supporting evidence at the trial. *Ibid.*

It was held that the plaintiff was not harmed by the exclusion of certain expert testimony as to what was the proper way to work in doing certain work on a guy pole, offered at a trial of an action against a street railway company for causing the death of a lineman resulting from the breaking of the guy pole, because the expert witness also testified that the method used was improper. *MacLellan* v. *Boston Elevated Railway*, 20.

An exception to the admission of incompetent evidence was sustained, although the judge had ruled that such evidence was incompetent, because the admission of the incompetent evidence was not referred to in the judge's charge and the jury were not instructed to disregard it, so that this court could not say that it did not have a tendency to prejudice the substantial rights of the plaintiff. *O'Hare* v. *Gloag*, 24.

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Where the judge presiding at the trial of an action for causing the death of the plaintiff's testatrix by running into her with an automobile owned and operated by the defendant, improperly allowed the plaintiff to show that the defendant in his application to the highway commission for a license to operate his automobile had failed to answer a question calling for the disclosure of any physical incapacity or infirmity, an exception by the plaintiff to a ruling permitting the defendant to explain his understanding of the meaning of the question in the application cannot be sustained. *O'Hare* v. *Gloag*, 24.

In an action by a workman in a shoe factory against a corporation doing a retail clothing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant, testimony of the plaintiff, that he was discharged by the foreman who said the superintendent "told me to let you go," while not strictly competent as to the alleged statement made by the superintendent to the foreman, was held not to have affected injuriously the substantial rights of the defendant. *Kennedy* v. *Hub Manuf. Co.* 136.

Appeal.

There can be no appeal to this court before a final jugdment from an order of a judge granting a motion for a new trial. *Sherman* v. *Collingwood*, 8.

In computing the "six days after the entry of the judgment" within which, by the provision of R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, a person aggrieved by a judgment of a municipal court in a civil action may appeal to the Superior Court, Sunday is excluded. *Stevenson* v. *Donnelly*, 161.

In the same statute, the word "days" means entire days, and an appeal perfected at any time during the sixth day, exclusive of Sunday, although not within the sixth secular period of twenty-four hours, is effectual. *Ibid.*

No appeal lies from a decision or order of a single justice of the Supreme Judicial Court dismissing a petition for a writ of habeas corpus. *Chambers's Case*, 178.

The provision of St. 1905, c. 288, regarding a report by the judge of the Land Court of his decision, in case of an appeal from the Land Court to the Superior Court for a jury trial on the facts, and the use of the report as evidence, so far as it relates to the effect of the report is a rule of evidence and findings contained in such a report which are based on extrinsic evidence that should not have been admitted to affect the construction of a clear description in a deed have no probative force. *Pollard* v. *Ketterer*, 317.

Whether an interlocutory order of the Superior Court, made upon a petition under St. 1909, c. 514, § 141, of the plaintiff in an action of tort against his employer for personal injuries, to permit the plaintiff's attorney to make an examination of the ways, works or machinery of the defendant through whose defect the injury occurred, is a "judgment founded upon matter of law apparent on the record in any proceeding," from which an appeal to this court can be taken under St. 1906, c. 342, § 2, it here was not necessary to decide. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

It also was unnecessary to decide whether, in a case where no exceptions were taken, an appeal from such an interlocutory order would stay the entry of judgment. *Ibid.*

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Where an action at law is heard by a judge without a jury, and the parties instead of putting in their evidence agree in writing upon certain facts on which the case is to be decided under the pleadings, this is not a submission of the case upon an agreed statement of facts, and, if there is an appeal from a judgment based on the finding of the judge in such a case, the question for this court is whether as matter of law the finding was warranted. *Harmon* v. *Sweet*, 587.

Supersedeas Bond.

A motion by a judgment creditor who obtained a judgment against a number of persons in an action of tort against the alleged members of a partnership jointly, that a supersedeas bond given by one of the judgment debtors by order of the Superior Court upon the granting of a petition by him for the vacation of the judgment be "so modified as not to deprive him [the creditor] of his right to collect" an execution, which had issued upon the judgment, "from the other defendants named in said action," must be denied. *Contakis* v. *Flavio*, 259.

Defence of Recoupment.

The defence of recoupment of damages in an action of contract is an equitable one and does not depend on the rules relating to set-off. *Bryne* v. *Dorey*, 399.

Where therefore such a defence is alleged in the answer of two defendants their rights in equity as well as at law may be considered. *Ibid.*

Accordingly, where a husband and wife were sued jointly, it was held, that overdue and unpaid notes, which had been made by the plaintiff and had been given by him to both defendants, although made payable to the wife only, as a part of the transaction on which the plaintiff's claim was founded, could be deducted in recoupment from the plaintiff's claim or, if in excess of that claim, could be used to extinguish it, no superior rights of third persons against either of the defendants having intervened. *Ibid.*

Habeas Corpus.

See that title.

PROBATE COURT.

Jurisdiction.

The Probate Court has jurisdiction to appoint as guardian of an illegitimate child a person other than the child's mother, although the mother is living. *Chambers's Case*, 178.

Appeal.

The brother of a spendthrift who brought the petition on which the decree of guardianship was made is a person aggrieved by a decree of the Probate Court terminating the guardianship of the spendthrift by accepting the resignation of his guardian, and therefore under R. L. c. 162, § 9, such brother may appeal to the Supreme Judicial Court, thereby suspending the operation of the decree and leaving the spendthrift under guardianship. *Sullivan* v. *Lloyd*, 108.

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It seems that the presumptive heirs and next of kin of the spendthrift also are persons aggrieved by such a decree and have a right of appeal, but it was not necessary to decide this in the present case. *Sullivan* v. *Lloyd*, 108.

Motions for new trials of issues framed upon appeals from decrees of the Probate Court are governed by the same rules as are motions for new trials in actions at common law. *Lambert* v. *Cheney*, 378.

A motion for a new trial of issues, which were framed by the Supreme Judicial Court on an appeal from a decree of a Probate Court allowing a will and were sent to the Superior Court for trial, can be made only in the Superior Court, where the issues were tried. *Ibid.*

In this Commonwealth the findings of a jury upon issues of fact framed upon an appeal from a decree of a Probate Court, if not set aside by this court for an error of law or by the court in which the issues are tried on a motion for a new trial, are conclusive upon the parties and their privies. *Ibid.*

Exceptions.

If, at the trial by a jury in the Superior Court of issues framed upon an appeal from a decree of the Probate Court allowing a will, there is evidence warranting findings in favor of the proponent of the will and the jury so find, the appellant cannot bring to this court the question whether such findings were against the weight of the evidence by an exception to a refusal of the presiding judge to order answers for him upon the issues. *Dunster* v. *Goward*, 339.

"Parties interested."

The assignee of a mortgage of real estate, given, after the death of a former owner of the real estate and before the appointment of an administrator of his estate, by a person who had acquired the rights of the heirs of the former owner in the property to secure a note of such person, is not one of the "parties interested" who, upon the filing of a petition under R. L. c. 146, § 18, as amended by Sts. 1904, c. 217; 1906, c. 73; 1907, c. 236, by the administrator for leave to sell the real estate for the purpose of distribution, have a right to notice of the petition, in case they do not consent, and to appeal from a decree granting the petition or from a decree refusing to revoke the license granted. *Giles* v. *Kenney*, 262.

PROXIMATE CAUSE.

See that subtitle under NEGLIGENCE.

RAILROAD.

Petition for damages resulting from a loss of view caused by the abolition of a grade crossing of a railroad with a highway. *Howell* v. *New York, New Haven, & Hartford Railroad*, 169.

When on a railroad train the conduct and speech of one passenger toward another is such that violence is likely to result unless some action is taken to prevent it, and the railroad corporation has reasonable notice of the situation and has the opportunity to take measures to prevent the impending violence, it becomes the duty of the corporation to protect the

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threatened passenger and to see that no harm comes to him. *Isenberg* v. *New York, New Haven, & Hartford Railroad*, 182.

An exception, taken at the trial of an action of tort against a railroad company for damages resulting from a fire caused by sparks communicated by a locomotive engine of the defendant, to the admission in evidence of the deposition of the widow of an assistant station agent of the defendant as to statements made by him, was sustained, because there was no evidence warranting the judge's finding that the declaration was made by the deceased person of his own knowledge. *Ames* v. *New York, New Haven, & Hartford Railroad*, 304.

See also NEGLIGENCE, *Railroad*.

REAL AND PERSONAL PROPERTY.

Where by the provisions of a will trustees are given power and authority to sell and convey and to make new investments and exchange of securities, but the will contains no express direction that the real estate held by them shall be sold and turned into money and a clear intention thus to convert cannot be implied from the language or general scope of the will, if the trustees sell the real estate, the proceeds thus received must be treated by them as realty until the fund resulting from the sale reaches the hands of one who is entitled to treat it as his own absolutely and for all purposes. *Whitman* v. *Huefner*, 265.

RECOGNIZANCE.

R. L. c. 198, § 66, requires that in an action for the breach of a poor debtor's recognizance, if a breach is proved, "judgment shall be entered for the amount of the penalty," and accordingly in such an action the trial judge must refuse a request of the defendant to rule that judgment should be entered for the plaintiff for nominal damages only. *American Stable Co.* v. *Clarke*, 271.

REFERENCE AND REFEREE.

See ARBITRAMENT AND AWARD.

RES INTER ALIOS.

See that subtitle under EVIDENCE.

RESTRICTION.

EQUITABLE RESTRICTION, see that title.

REVERE.

Rulings relating to the constitutionality of St. 1911, c. 581, as amended by St. 1913, c. 341, and to the report of the commission appointed thereunder to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge. *Boston, petitioner*, 468.

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REVOLVING DOOR.

Negligence in the maintenance of a defective revolving door. *Norton* v. *Chandler & Co. Inc.* 99.

RULES OF COURT.

Rule 29 of the Superior Court, *Sherman* v. *Collingwood*, 8.
Rule 45 of the Superior Court, *Chandler* v. *Prince*, 495.

SALES OF MERCHANDISE IN BULK.

Under St. 1903, c. 415, relating to sales of merchandise in bulk, a sale of all the merchandise and fixtures at the place of business of the seller, in which the parties honestly try to comply with the requirements of the statute but by mistake give notice only to the merchandise creditors of the seller and fail to prepare a list of and give notice to his general creditors as required by the statute, is voidable by the general creditors as to the merchandise, although it is good as a sale of the fixtures. *Rabalsky* v. *Levenson*, 289.

A general creditor of one who in selling his entire stock of merchandise failed to furnish a list of his general creditors to the purchaser so that the purchaser did not give notice of the sale to such creditors as required by St. 1903, c. 415, cannot procure the setting aside of the sale in a proceeding in which the purchaser is not made a party. *Ibid.*

It seems that a *bona fide* assignee of a balance of the proceeds from such a sale under such circumstances, who took the assignment in part payment of a debt justly due to him from the seller, is entitled to hold such balance against a general creditor who after the assignment institutes proceedings to avoid the sale. *Ibid.*

SCHOOLS AND SCHOOL COMMITTEES.

The determination of the methods of teaching and the management and direction of pupils and studies in high schools in this Commonwealth rest in the wise discretion and sound judgment of the teachers and the school committees, whose action in these respects is not subject to revision by this court. *Wulff* v. *Wakefield*, 427.

Neither a pupil nor the parent of a pupil in a bookkeeping class in a high school has a right to insist that the teacher shall change his method of teaching by requiring the teacher to cease having one of the pupils do the merely clerical work of comparing the written answers of the pupils to problems with those in a key book and to do the work himself. *Ibid.*

Application of the foregoing principles in an action under R. L. c. 44, § 7, for the alleged unlawful expulsion of the plaintiff from a high school where it was held that there was no evidence of an unreasonable expulsion of the plaintiff from the school, it appearing that she absented herself because the school authorities refused, within their powers, to accede to a demand of the plaintiff and her parents that certain clerical work be done by the teachers and not by a competing pupil. *Ibid.*

This court, however, expressed disapproval of the practice of setting a rival pupil in judgment upon the work of an eager and zealous competitor. *Ibid.*

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SEASHORE.

On the findings contained in a master's report it was held, that there was evidence that a corporation, whose purposes were to provide a place for holding camp, grove and other meetings of a social and religious character and to create and establish a popular summer resort, by its acts and declarations had dedicated the use of certain lands to the public and ample evidence of acceptance by the public. *Attorney General* v. *Onset Bay Grove Association*, 342.

SHELL FISH.

The provisions of R. L. c. 91, §§ 113, 114, relating to the prohibiting by the commissioners on fisheries and game of the taking of oysters, clams, quahaugs and scallops from certain defined areas of tidal water and flats upon receipt of a request to that effect from the State board of health, are a valid exercise of the police power by the General Court. *Commonwealth* v. *Feeney*, 323.

The provision of § 113 above described, that the order of the commissioners on fisheries and game shall prohibit the taking of such shell fish from such contaminated waters or flats "for such period of time as the State board of health may prescribe," does not require that the State board of health in its request nor the commissioners in their order shall state when the prohibition shall cease, but means only that the prohibition shall remain in force until the State board of health becomes satisfied that the contamination has ceased. *Ibid.*

SHIP.

Action against an ocean going steamship company for causing the death of a passenger who, when the vessel lurched, was thrown overboard at a place where there was no guard chain or rail. *Hanley* v. *Eastern Steamship Corp.* 125.

When an ocean going vessel is carrying several hundred passengers and on a deck to which the passengers are admitted the open space between two life boats near the edge of the deck is guarded only by a chain which is unfastened easily, it is the duty of the owner of the vessel to make some sort of inspection to protect passengers against the danger likely to follow if the guard chain becomes unfastened. *Ibid.*

If under such circumstances a passenger is injured by falling overboard through the open space between the life boats, in an action to recover for his injuries it is a question for the jury whether such reasonable inspection as the owner ought to have exercised would have revealed the fact that the guard chain had become unfastened. *Ibid.*

The regulations of the United States requiring ocean going vessels to have life boats so placed and fitted that they can be launched safely in less than two minutes do not absolve the owner of such a vessel, when carrying passengers and permitting them to use the deck where the life boats are, from his duty to maintain reasonable guard chains between the ends of two life boats to prevent passengers from falling overboard in the open space between the boats, or, if the only kind of guard consistent with the federal regulations is an insecure one, from his duty to exclude passengers from the immediate neighborhood of the life boats. *Ibid.*

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SLAUGHTER HOUSE.

Under R. L. c. 75, § 100, as amended by St. 1911, c. 297, § 2, the question, whether the population of a certain town is more than five thousand so that a license for a slaughter house can be granted by the board of health instead of by the selectmen, must be determined by the last census taken by the Commonwealth or by the United States and in no other way. *Commissioner of Health* v. *Bunzel*, 31.

SMALL LOANS ACT.

If, after St. 1912, c. 675, § 5, amending the small loans act, went into effect, a person unlicensed under the act, in a transaction which was subject to its provisions, accepted a note in place of another note which was valid and was given to him before the act took effect, the note so received by him is void and he cannot maintain an action upon it. *Bennett* v. *Tremont Securities Co.* 218.

But in a proper action or suit he can recover the amount still due upon the debt for which he received the note. *Ibid.*

SPENDTHRIFT.

Under R. L. c. 145, §§ 7–11, one under guardianship as a spendthrift cannot make a valid contract to marry. *Sullivan* v. *Lloyd*, 108.

The brother of a spendthrift who brought the petition on which a decree of guardianship was made is a person aggrieved by a decree of the Probate Court terminating the guardianship of the spendthrift by accepting the resignation of his guardian, and therefore under R. L. c. 162, § 9, such brother may appeal to the Supreme Judicial Court, thereby suspending the operation of the decree and leaving the spendthrift under guardianship. *Ibid.*

It seems that the presumptive heirs and next of kin of the spendthrift also are persons aggrieved by such a decree and have a right of appeal, but it was not necessary to decide this in the present case. *Ibid.*

As to spendthrift trusts, see that subtitle under TRUST.

SPRINGFIELD.

The city of Springfield under its charter, St. 1852, c. 94, § 14, as amended by St. 1872, c. 334, and St. 1873, c. 126, and under the general laws has no authority in laying out or widening a public way to take by eminent domain more than an easement except under the circumstances provided for in St. 1904, c. 443, § 2. *Excelsior Needle Co.* v. *City Council of Springfield*, 34.

An attempt by the city of Springfield under St. 1904, c. 443, § 2, to take in fee by right of eminent domain only the part of a certain estate of land which is required for the widening of a public way, which is void as being beyond the powers of the city, cannot be construed as a taking of the public easement which the law allowed to be taken. *Ibid.*

STATUTE.

Construction.

Where a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited is less than a week, Sunday is excluded. *Stevenson* v. *Donnelly*, 161.

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The fact that the city of Boston widened a draw in Chelsea Bridge from thirty-two to fifty feet in 1895, and in 1899 widened it further to sixty feet and, without raising any question as to an apportionment of the expense thereof, continued to pay the entire expense of construction, repair and maintenance up to the enactment of St. 1911, c. 581, does not affect the true interpretation of St. 1880, c. 159, as relating only to the draw as it existed in 1880. *Boston, petitioner*, 468.

St. 1909, c. 514, § 141, which re-enacted St. 1908, c. 380, applies to injuries for which the remedy is at common law as well as to injuries that give a right of action under the employers' liability act. *Wylie* v. *Blake & Knowles Steam Pump Works*, 489.

Repeal or Modification.

St. 1880, c. 159, was a governmental regulation of the north draw of Chelsea Bridge as it then existed, and its provisions were subject to modification or repeal according to the wisdom of the Legislature. St. 1911, c. 581, § 5, did not transform that regulation into a contract. *Boston, petitioner*, 468.

No Extraterritorial Effect.

Statutes relating to taxation by a necessary implication do not extend beyond the jurisdiction of the State enacting them. *Walker* v. *Treasurer & Receiver General*, 600.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 737.

STEAMSHIP.

See SHIP.

STREET RAILWAY.

See that subtitle under NEGLIGENCE.

STRIKE.

Discussion by DE COURCY, J., of the test of the legality of strikes and their relation to labor unions. *Cornellier* v. *Haverhill Shoe Mfrs. Association*, 554.

It was held that a suit in equity against certain shoe manufacturers in a certain city, to enjoin them from blacklisting the plaintiff because he took part in a strike against another shoe manufacturer in the same city, could not be maintained, because for more than three months after the filing of the bill the plaintiff had been taking part in the strike against his employer conducted by unlawful means in which the plaintiff joined. *Ibid.*

Such employee must seek redress in an action at law for any damage that he suffered by reason of the blacklisting. *Ibid.*

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SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Since St. 1885, c. 384, took effect the Superior Court always is open for business, and the practice founded on the terms of court that existed before that statute no longer has any foundation. *Kennedy* v. *Hub Manuf. Co.* 136.

Accordingly a judge of the Superior Court may grant a motion for the extension of the time for filing exceptions after the adjournment of the sitting of the court at which the case was tried. *Ibid.*

The Superior Court is not deprived of its jurisdiction in equity to remove clouds upon titles by the provisions of St. 1904, c. 448, conferring exclusive and original jurisdiction upon the Land Court both in law and equity of petitions under R. L. c. 182, §§ 11–14, inclusive, to determine the validity of certain incumbrances. *McArthur* v. *Hood Rubber Co.* 372.

Nor is the remedy granted by those sections so adequate and complete as to exclude general equity jurisdiction of the subject. *Ibid.*

A judge of the Superior Court has no power to order a new trial for a reason not expressly stated in a motion for a new trial or by fair implication included within the reasons therein stated. *Parker* v. *Lewis J. Bird Co.* 422.

SUPREME JUDICIAL COURT.

No appeal lies from a decision or order of a single justice of the Supreme Judicial Court dismissing a petition for a writ of habeas corpus. *Chambers's Case*, 178.

It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus. The usual method of bringing the question of the correctness of such rulings before this court is by a report or a reservation by the single justice, or an adjournment of the case into this court for determination. *Ibid.*

It was held to have been proper under the circumstances for a single justice of this court on the return day of the order of notice on a petition for a writ of habeas corpus seeking the discharge of an illegitimate minor from the custody of a guardian appointed by the Probate Court, to hear the parties without the issuance of the writ or the production of the minor for the purpose of ascertaining whether there was cause, *prima facie*, for the issuance of the writ, and after such hearing to dismiss the petition. *Ibid.*

A motion for a new trial of issues, which were framed by the Supreme Judicial Court on an appeal from a decree of a Probate Court allowing a will and were sent to the Superior Court for trial, can be made only in the Superior Court, where the issues were tried. *Lambert* v. *Cheney*, 378.

Constitutionality of St. 1911, c. 581, as amended by St. 1913, c. 341, empowering the Supreme Judicial Court to appoint a commission to apportion the cost of construction, reconstruction, repairs and maintenance of Chelsea Bridge, the Meridian Street Bridge and the Chelsea Street Bridge. *Boston, petitioner*, 468.

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TAX.

Tax Statute has no Extraterritorial Effect.

Statutes relating to taxation by a necessary implication do not extend beyond the jurisdiction of the State enacting them. *Walker* v. *Treasurer & Receiver General*, 600.

Assessment.

On certain facts it was held that one who made an assignment for the benefit of his creditors had a place of business after the assignment within the meaning of St. 1909, c. 490, Part I, § 23, cl. 8, which determined where the property in the hands of the assignee should be assessed for taxation, and that such place of business was Boston. *Collector of Taxes of Boston* v. *New England Trust Co.* 384.

The decision in Sears *v.* Nahant, 215 Mass. 329, was affirmed. *Sears* v. *Nahant*, 437.

The advice of counsel to an executor that he is not required to bring in to the assessors of a town a list of taxable property of the estate of his testator under the provisions of St. 1909, c. 490, Part I, §§ 41, 49, is not as matter of law good cause for a failure of the executor to bring in such a list. *Ibid.*

Where the executors of a will also were the trustees thereunder and made a return to the assessors that they had delivered to themselves as trustees a certain amount of personal property, but they had made no distribution to themselves as trustees which had been allowed by the Probate Court, a failure of the assessors of a town to deduct from the tax assessed to such executors the amount assessed to them as trustees on their return to the assessors was held not to be good cause for a failure of the executors to bring in a list of property in accordance with the provisions of the statutes named above. *Ibid.*

On Legacies and Successions.

At the trial of an information in equity, brought under St. 1909, c. 266, § 1, and St. 1909, c. 490, Part IV, §§ 19, 20, against an administrator to recover a succession tax, where it appeared that the tax commissioner had determined the value of the taxable estate and had notified the defendant of such determination and that no proceedings had been taken under § 19 to reduce such valuation, it was held that, although such determination was final, the defendant might show that the payment by him as administrator of just debts of his intestate so reduced the total assets of the estate that no tax was due. *Attorney General* v. *Laycock*, 146.

Whether in such a suit a decree of the Probate Court allowing the account of the defendant as administrator in which the payments of the debts of his intestate were stated, the decree having been entered without any notice to the Commonwealth, is binding upon the Attorney General, it was unnecessary to determine, because the amount of the payments made by the defendant as administrator was not in dispute. *Ibid.*

Shares of the capital stock of Massachusetts corporations owned by one domiciled in another State at the time of his death were subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1. *Bliss* v. *Bliss*, 201; *Borden* v. *Treasurer & Receiver General*, 212.

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Registered bonds of this Commonwealth which were owned by a non-resident at the time of his death and were kept by him at the place of his domicil were subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1. *Bliss* v. *Bliss*, 201.

Where, under the law of the State of New York governing the succession tax in that State, a tax on successions was imposed on all tangible personal property in that State owned by a non-resident, and all intangible property of a non-resident, including bonds and shares of stock in foreign corporations, was not subject to the tax, a "like exemption" is made in favor of citizens of this Commonwealth to that given to non-residents by the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1. *Ibid.*

Therefore those provisions apply in the assessment of a succession tax upon registered bonds of this Commonwealth and shares of the capital stock of Massachusetts corporations owned by one who died domiciled in the State of New York, and such property was subject only to such portion of the tax as was in excess of the tax imposed by the laws of the State of New York. *Ibid.*

Another instance where the same rule was applied. *Borden* v. *Treasurer & Receiver General*, 212.

Promissory notes of a firm of five partners having offices in the State of New York, where two of the partners had their domicil, and in the State of Illinois, where one partner had his domicil, and in this Commonwealth, where two partners had their domicil, drawn and made payable in Boston to one of the New York partners and owned and kept by him in New York at the time of his death there, were held under the circumstances not to be subject to the succession tax imposed by St. 1909, c. 490, Part IV, § 1, as amended by St. 1909, c. 527, § 1. *Bliss* v. *Bliss*, 201.

Where a clause in a will by which the intestate exercised a certain power of appointment, given to him by the will of his mother, was followed by a clause expressing the testator's wish that "all the legacies hereinbefore given to be paid in full to the various legatees without deduction for legacy taxes and succession dues," it was held under the circumstances that the word "legacies" was not intended to include appointments, and that the succession taxes payable to the Commonwealth on the transfers made under the appointment were payable out of the fund appointed and not out of the residue of the estate of the testator. *Loring* v. *Gardner*, 571.

Under St. 1909, c. 490, Part IV, § 1, and St. 1909, c. 527, § 8, the exercise by a testator, whose domicil was in this Commonwealth and whose will was proved here, of a power of testamentary appointment given to him by the will of a testator, whose domicil was in another State, transferring by such appointment the title to personal property held by a trustee in such other State, is not subject to a succession tax. *Walker* v. *Treasurer & Receiver General*, 600.

The so called succession tax imposed by our statutes on the passing of property by the exercise of a power of appointment is an excise upon the commodity of the privilege of passing title under the sanction and protection of the laws of this Commonwealth, and the statutes imposing such excise have no application where the property transferred by the exercise of the power is not physically within the jurisdiction of this Commonwealth and the succession to it does not depend on any privilege conferred by our laws. *Ibid.*

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On Intangible Property held by Trustees.

Under St. 1909, c. 490, Part I, § 23, cl. 5, bonds and shares of corporate stock, the legal title to which is in trustees residing in this Commonwealth, where all the beneficiaries of the trust reside out of the Commonwealth, must be assessed for taxation to such trustees, although the bonds and the certificates of stock are deposited and kept in another State and the trustees were appointed by a probate court of such other State. *Welch* v. *Boston*, 155.

In the present case it was unnecessary to consider what would have been the effect of a statute of the State where the evidences of the intangible property were deposited and kept undertaking to establish by law a *situs* in that State for all intangible property held by trustees appointed by its courts. *Ibid.*

It also was unnecessary to consider what the decision of this court would have been if the property assessed here for taxation had been part of an estate in process of settlement and distribution in the courts of another State. *Ibid.*

Remedy for Over-assessment.

An action at law cannot be maintained against a town or city to recover back a part of a tax on the ground of over-assessment, whether the excess in the assessment arose from over-valuation or from the improper inclusion of property not owned by the person to whom the tax was assessed, the exclusive remedy in such a case being a petition for an abatement under R. L. c. 12, §§ 77, 78, now St. 1909, c. 490, Part I, §§ 76, 77. *Sears* v. *Nahant*, 435.

TIME.

Where a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited is less than a week, Sunday is excluded. *Stevenson* v. *Donnelly*, 161.

In computing the "six days after the entry of the judgment" within which, by the provision of R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, a person aggrieved by a judgment of a municipal court in a civil action may appeal to the Superior Court, Sunday is excluded. *Ibid.*

In the same statute, the word "days" means entire days, and an appeal perfected at any time during the sixth day, exclusive of Sunday, although not within the sixth secular period of twenty-four hours, is effectual. *Ibid.*

Where, at the trial of an action against a manufacturer for the alleged breach of a contract to employ the plaintiff for a year, it appeared that the only question was whether the action was brought before the contract was broken, the defendant was held not to be entitled to a ruling that there was no breach of the contract at the time the action was brought. *Marshall* v. *Columbia Manuf. Co.* 176.

Under the circumstances, it was held that time was not of the essence of a contract for the sale of land. *Mansfield* v. *Wiles*, 75.

TOWN.

See Municipal Corporations.

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TRUST.

What constitutes.

The ordinary relation of pledgor and pledgee, although sometimes spoken of as in the nature of a trust, is not a fiduciary one as affecting the period of limitation of actions at law or the time within which a suit in equity must be brought. *Wehrle* v. *Mercantile National Bank of Salem*, 585.

Construction.

Upon the construction of the language of a will which gave the residue of the testator's estate to trustees in trust to pay the income to his wife for life, with power to pay to her out of the principal such amount as should meet the requirements of her suitable maintenance and the care and education of his minor children, and, upon the decease of the widow to pay over to his children and to the issue of any deceased child by right of representation all of said trust fund then remaining, it was held that by the established rules of construction the interest of the children of the testator vested at his death. *Whitman* v. *Huefner*, 265.

It also was held that the mere fact that the trustees were authorized to expend principal during the widow's life and thus to decrease the size of a remainderman's share did not establish an intention to postpone the vesting until the widow's death. *Ibid.*

The language of a certain will providing that a trust fund should be distributed "to such of my grandchildren as shall then be living in equal shares," was held clearly to show that a child of a grandchild whom the testator had adopted as a child should be treated as a great-grandchild and not as a grandchild and therefore should be excluded from the distribution. *Clarke* v. *Rathbone*, 574.

It was held that words missing from an incomplete sentence in a will providing for a trust could not be supplied by conjecture, but that the words as they stood must be construed. *Ibid.*

In this case it was held that their meaning was that certain income was given to the children of the testator named as a class, and that upon the death of one of them the income was to be paid to the survivors until, upon the death of all but one, the whole income was to be paid to the last survivor until his or her death. *Ibid.*

Duties of Trustee.

Where by the provisions of a will trustees are given power and authority to sell and convey and to make new investments and exchange of securities, but the will contains no express direction that the real estate held by them shall be sold and turned into money and a clear intention thus to convert cannot be implied from the language or general scope of the will, if the trustees sell the real estate, the proceeds thus received must be treated by them as realty until the fund resulting from the sale reaches the hands of one who is entitled to treat it as his own absolutely and for all purposes. *Whitman* v. *Huefner*, 265.

Taxation.

Tax on intangible property held by trustees, see appropriate subtitle under TAX.

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Capital and Income.

An accumulated surplus of undivided profits of a manufacturing corporation, which is distributed among its stockholders by means of a special dividend of $50 a share on shares of the par value of $100 each with the effect of diminishing substantially the present market value of the shares, is income and not capital. *Talbot* v. *Milliken*, 367.

And therefore a trustee, who holds such shares in trust to pay the income to certain persons for life with remainders over to others, should pay the whole of the dividend to the beneficiaries for life. *Ibid.*

Spendthrift Trust.

Provisions of a trust created by a will under which it was held that the trustee in bankruptcy of one of the beneficiaries had no interest during the life of the bankrupt which he could enforce in equity. *Brown* v. *Lambert*, 419.

But that the bankrupt as an heir at law had an interest in remainder in the real estate held in trust during his life, which became vested on the death of the testator and passed to the trustee in bankruptcy upon the adjudication in bankruptcy, but that the trustee in bankruptcy had no occasion to seek the aid of a court of equity as to that interest. *Ibid.*

UNDUE INFLUENCE.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud or undue influence, where a certain witness was asked as to a certain period "What did you notice in that period about" the alleged testator "as to whether he was easily influenced?" and answered, "He was childish," it was held that the answer properly was stricken out by the presiding judge, the witness on further examination apparently stating all the facts from which he drew his conclusion, and they appearing to be neither complex, difficult of statement or description nor full of minute detail. *Johnson* v. *Foster*, 248.

At such trial, a limitation by the presiding judge in the exercise of his discretion of the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged codicil was held to be neither unfair nor arbitrary. *Ibid.*

Objection to the charge to the jury at such trial, that the judge saw and called attention to more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting on the testimony of the witnesses for the executor, was held not to be a ground for exception under the circumstances. *Ibid.*

Where, at the trial of issues, framed on an appeal from a decree of the Probate Court allowing a will and relating to the testator's mental capacity and as to whether undue influence was exerted upon him, it appears that the testator stated in the will that his reason for leaving nothing to the appellant, who was his sister and his sole heir at law, was that she had abundant property for her needs, the appellant may be asked in her cross-examination as a witness to state the amount, kind and location of her property. *Dunster* v. *Goward*, 339.

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UNION.

LABOR UNION, see that title.

UNLAWFUL INTERFERENCE.

By blacklisting, see BOYCOTT.

USAGE.

See CUSTOM.

VARIANCE.

See that subtitle under PRACTICE, CIVIL.

VENUE.

See that subtitle under PRACTICE, CIVIL.

VERDICT.

See that subtitle under PRACTICE, CIVIL.

WAGERING CONTRACT.

In an action under R. L. c. 99, § 4, by the executor of the will of a woman, for the value of securities alleged to have been delivered by the plaintiff's testatrix to the defendant as margins on wagering contracts, where an auditor found that the testatrix employed the defendant, who was a stockbroker, "to buy and sell securities upon her account upon margin contracts, intending at the time, that the defendant should make actual purchase or sale of such securities as she from time to time ordered," and where it appeared that this finding covered all purchases and all sales ordered by the testatrix including twenty-five short sales of stocks not owned by her when she gave the order to sell, there is evidence warranting a verdict for the defendant. *Chandler* v. *Prince*, 495.

The foregoing is none the less so by reason of a finding of the auditor that the testatrix employed the defendant to "carry for her upon margins such [securities] as were purchased until their sale was ordered." *Ibid.*

Or by reason of a finding that the testatrix "never intended herself to pay the defendant in full for all said purchases, but she intended and contracted that after the defendant had made the actual purchases ordered that he should carry the securities for her upon margin, and sell such as she ordered to be sold or deliver to her any that she might elect to pay for in full." *Ibid.*

In the case above described the defendant set up and relied upon the affirmative defence that the purchases and sales were actual ones, and it was pointed out by this court, that the presumption created by the provision of R. L. c. 99, § 6, that the fact that the seller or the person employing another to sell for his account did not own the securities at the time of giving the order to sell shall "be *prima facie* evidence that within the meaning of section four there was an intention that there should be no actual purchase or sale,"

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does not apply to the issue of the affirmative defence under § 4 that the purchases and sales were actual ones. *Chandler* v. *Prince*, 495.

In the foregoing action, two questions were put to the jury as follows: 1. "Did the plaintiff's testatrix intend there should be no actual purchase or sale of the stocks?" 2. "Did the defendant have reasonable cause to believe that such intention existed on the part of the plaintiff's testatrix?" and an affirmative answer to the second question after a negative answer to the first was held under all the circumstances not to show that the jury misunderstood the instructions as to the first question, so that exceptions to the instructions in regard to the first question were overruled and a general verdict returned for the defendant was allowed to stand. *Ibid.*

WAIVER.

Driver of an express team was held to have no authority to waive a limitation of liability in a receipt for a trunk. *Boynton* v. *American Express Co.* 237.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, is a personal privilege and not a property right. *Jones* v. *Maguire*, 315.

And therefore before the enactment of St. 1915, c. 23, that right could not be exercised by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Ibid.*

In a suit in equity, where the defendant has filed a demurrer and also an answer, the reference of the case to a master to find the facts without any objection on the part of the defendant and the appearance of the defendant at the hearings before a master are a waiver of the demurrer. *Attorney General* v. *Onset Bay Grove Association*, 342.

WAY.

Public.

The city of Springfield under its charter, St. 1852, c. 94, § 14, as amended by St. 1872, c. 334, and St. 1873, c. 126, and under the general laws has no authority in laying out or widening a public way to take by eminent domain more than an easement except under the circumstances provided for in St. 1904, c. 443, § 2. *Excelsior Needle Co.* v. *City Council of Springfield*, 34.

An attempt by the city of Springfield under St. 1904, c. 443, § 2, to take in fee by right of eminent domain only the part of a certain estate of land which it required for the widening of a public way, which is void as being beyond the powers of the city, cannot be construed as a taking of the public easement which the law allowed to be taken. *Ibid.*

The provision of St. 1904, c. 443, § 2, confers no authority to take the fee of any land except in cases where there would be an unsuitable remnant left if only the part actually required for the public undertaking were taken; and accordingly the right to take land in fee is conditional upon there being such an unsuitable remnant which also is taken. *Ibid.*

One who under a lawful permit from a city digs a trench in a public sidewalk

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assumes the duty of taking proper precautions to prevent accidents to travellers. *Dolan* v. *Charles J. Jacobs Co.* 256.

In the absence of adequate precautions such trench becomes a nuisance and the person who dug it is liable for injury caused by it to a traveller in the exercise of due care. *Ibid.*

Evidence at the trial of an action by an elderly woman for personal injuries received from falling into such a hole, upon which it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant left the trench insufficiently guarded or lighted and thus caused the plaintiff's injuries, were for the jury. *Ibid.*

WILL.

Attestation.

R. L. c. 135, § 1, does not require that a testator should request the subscribing witnesses to attest his will or that he should declare the instrument to be his will. It is sufficient that the witnesses should attest and subscribe the will in the presence of the testator. *Steele* v. *Marble*, 485.

The nurse of a testatrix, who in her presence and by her express direction signed the name of the testatrix to her will, is a competent attesting and subscribing witness to the will, the signature attested being under R. L. c. 135, § 1, the signature of the testatrix herself and not that of the person who wrote it. *Ibid.*

Execution.

Evidence upon which, under R. L. c. 135, § 1, a signature by the hand of a nurse can be found to have been a valid signature of a testatrix. *Steele* v. *Marble*, 485.

Validity.

At the trial of issues as to the soundness of mind of an alleged testator and as to whether the execution of a will and the execution of a codicil by him were procured by fraud and undue influence, where a certain witness was asked as to a certain period "What did you notice in that period about" the alleged testator, "as to whether he was easily influenced?" and answered, "He was childish," it was held that the answer properly was stricken out by the presiding judge, the witness on further examination apparently stating all the facts from which he drew his conclusion, and they appearing to be neither complex, difficult of statement or description nor full of minute detail. *Johnson* v. *Foster*, 248.

At such trial, a limitation by the presiding judge in the exercise of his discretion of the evidence of the alleged testator's mental condition to a period beginning four years before the date of the alleged codicil was held to be neither unfair nor arbitrary. *Ibid.*

Objection to the charge to the jury at such trial, that the judge saw and called attention to more possible defects and inherent defaults in the testimony of the contestant's witnesses than he saw or pointed out in commenting on the testimony of the witnesses for the executor, was held not to be a ground for exception under the circumstances. *Ibid.*

Where, at the trial of issues, framed on an appeal from a decree of the Probate Court allowing a will and relating to the testator's mental capacity and as

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to whether undue influence was exerted upon him, it appears that the testator stated in the will that his reason for leaving nothing to the appellant, who was his sister and his sole heir at law, was that she had abundant property for her needs, the appellant may be asked in her cross-examination as a witness to state the amount, kind and location of her property. *Dunster* v. *Goward*, 339.

Construction.

It was held not necessary to decide, where a certain testatrix at the time of the execution of her will was a resident of another State and at the time of her death was a resident of this Commonwealth where her will was proved, by the law of which State the language of the will was to be interpreted, because in regard to the question to be passed upon the law of the two States was the same. *Goodrich* v. *Henderson*, 234.

See also DEVISE AND LEGACY.

Election by Surviving Husband.

The right of a surviving husband under R. L. c. 135, § 16, to elect whether he will accept or waive the provisions made for him in the will of his deceased wife, is a personal privilege and not a property right. *Jones* v. *Maguire*, 315.

And therefore before the enactment of St. 1915, c. 23, that right could not be exercised by the conservator of the property of an insane surviving husband appointed under R. L. c. 145, § 40, as amended before 1915, although by R. L. c. 145, § 33, a guardian of an insane person is given such a power. *Ibid.*

WITNESS.

Direct Examination.

In this Commonwealth the admission of leading questions in the direct examination of a witness is within the discretionary power of the judge presiding at the trial and, at any rate when confined to reasonable limits, is not subject to revision by exception or otherwise. *Partridge* v. *Middlesex & Boston Street Railway*, 273.

Cross-examination.

The limits of cross-examination are subject to the discretionary regulation of the presiding judge. *O'Hare* v. *Gloag*, 24.

Certain evidence which was held admissible in cross-examination of the predecessor in title of a defendant corporation in an action by a workman in a shoe factory against a corporation doing business on the credit system for maliciously causing the discharge of the plaintiff by serving on his employer a copy of an assignment of wages alleged to have been executed by the plaintiff to the defendant. *Kennedy* v. *Hub Manuf. Co.* 136.

Qualification of Expert.

Finding of a master, who heard a suit in equity involving the question, what was a proper computation of the net profits of a corporation, that a certain witness was qualified to testify as an expert on the question of the ratio of depreciation of the defendant's plant, was held not to have been improper. *Stein* v. *Strathmore Worsted Mills*, 86.

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Attestation of Will.

R. L. c. 135, § 1, does not require that a testator should request the subscribing witness to attest his will or that he should declare the instrument to be his last will. It is sufficient that the witnesses should attest and subscribe the will in the presence of the testator. *Steele* v. *Marble*, 485.

The nurse of a testatrix, who in her presence and by her express direction signed the name of the testatrix to her will, is a competent attesting witness to the will, the signature attested being under R. L. c. 135, § 1, the signature of the testatrix herself and not that of the person who wrote it. *Ibid.*

Impeachment.

It was held that the testimony in an action of contract relating to a letter purporting to have been dictated by a witness, whom the defendant was seeking to impeach, which was typewritten on paper with the heading of the witness's firm and was signed in typewriting in the name of the witness, required that the letter be admitted in evidence in order that the jury might pass upon the question whether the witness dictated it so that, if they found that he did, they might consider it upon the question of the witness's credibility. *Slotnick* v. *Silberstein*, 59.

Failure to Testify.

In a suit in equity to set aside a conveyance by a husband to his wife alleged to have been made in fraud of creditors at common law, it was said, that under the circumstances the inferences to be drawn against the defendant on account of a failure of herself and her husband to testify at the present trial were reduced to a minimum. *Lyon* v. *Wallace*, 351.

Testimony at Former Trial.

At a new trial of an action, after a rescript of this court sustaining exceptions, a transcript of the testimony given at the former trial by one of the witnesses for the adverse party who is living and within the jurisdiction of the court is not competent in place of the witness who might be summoned. *Chandler* v. *Prince*, 495.

Deposition.

See that subtitle under PRACTICE, CIVIL.

WORDS.

"Actual cost." See *Fillmore* v. *Johnson*, 406, 410, 411, 412, 413.

"Any time." See *Starkweather* v. *Gleason*, 552, 553.

"Business." See *Collector of Taxes of Boston* v. *New England Trust Co.* 384, 388.

"Charges." See *Gardner* v. *Lowell*, 150, 153.

"Chiropractic." See *Commonwealth* v. *Zimmerman*, 184, 187, 188; *Commonwealth* v. *New England College of Chiropractic*, 190, 194.

"Commencement." See *Haskell* v. *Cunningham*, 49, 51, 53.

"Common victualler." See *Commonwealth* v. *Meckel*, 70, 72.

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Words (*continued*).

"Cosmopathic." See *Commonwealth* v. *Zimmerman*, 184, 189.
"Days." See *Stevenson* v. *Donnelly*, 161, 164.
"Degree." See *Commonwealth* v. *New England College of Chiropractic*, 190 194.
"Doctor." See *Commonwealth* v. *New England College of Chiropractic*, 190, 193, 194.
"Future earnings." See *Jump* v. *Bernier*, 241, 246.
"Incapable of use." See *Floccher's Case*, 54, 56.
"Legacies." See *Loring* v. *Gardner*, 571, 572, 573.
"Let." See *Jones* v. *Donnelly*, 213, 217.
"Like exemption." See *Bliss* v. *Bliss*, 201, 210, 211.
"Maintain." See *Plimpton* v. *New York, New Haven, & Hartford Railroad*, 548, 551.
"Maintenance." See *Boston, petitioner*, 468, 475.
"Medicine." See *Commonwealth* v. *Zimmerman*, 184, 188.
"Milk." See *Commonwealth* v. *Elm Farm Milk Co.* 68, 69.
"Neither party." See *White* v. *Beverly Building Association*, 15, 17, 18.
"Net profits." See *Stein* v. *Strathmore Worsted Mills*, 86, 88, 89, 90, 92.
"Office." See *Gardner* v. *Lowell*, 150, 153.
"Parties interested." See *Giles* v. *Kenney*, 262, 263, 264.
"Period of time." See *Commonwealth* v. *Feeney*, 323, 325.
"Place of business." See *Collector of Taxes of Boston* v. *New England Trust Co.* 384, 388; also compare *Hanley* v. *Eastern Steamship Corp.* 125, 133.
"Reasons." See *Gardner* v. *Lowell*, 150, 153.
"Space." See *Goldsmith* v. *Traveler Shoe Co.* 482, 483, 484, 485.
"Usual place of business." See *Hanley* v. *Eastern Steamship Corp.* 125, 130, 131, 132.
"Within six days." See *Stevenson* v. *Donnelly*, 161, 163.

WORKMEN'S COMPENSATION ACT.

Dependency.

In a claim under the workmen's compensation act by the daughter of a deceased employee whose death resulted from an injury arising out of his employment, where it appears that the widow of the employee was not living with him at the time of his death and makes no claim as a dependent, it was held on the evidence that the daughter, who lived with her mother, at the time of her father's death, was wholly dependent upon him for support. *Carter's Case*, 105.

Amount of Award.

Under the provision of the workmen's compensation act as amended by St. 1914, c. 708, § 6, where the elbow of an injured workman's right arm is gone permanently, the right hand is paralyzed, leaving only a slight power of motion in the thumb and first finger and there is "interference of the circulation, so that he has a hand that goes to sleep," and where it could be found that it was pure speculation whether, if the workman should submit to a certain operation, the hand ever would become in any normal sense a useful member, a finding was held to be warranted that the workman's right hand was "permanently incapable of use." *Floccher's Case*, 54.

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WRIT OF ENTRY.

It was held that an alleged mistake in including in a deed of real estate a strip of land which was not intended to be conveyed could not be corrected in defence to a writ of entry brought by the grantee of the added strip of land to assert his title, unless under R. L. c. 173, § 28, the grantee of the diminished lot could be allowed to set up a mutual mistake of fact as an equitable defence, a question which was not raised in this case. *Pollard* v. *Ketterer*, 317.

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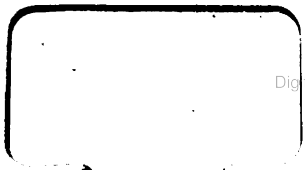

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